IN THE

# Supreme Court of the United States

OCTOBER TERM, 1943.

No. 338.

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*vs.*

HEARST PUBLICATIONS, INCORPORATED,

*Respondent.*

## BRIEF OF RESPONDENT IN NO. 338.

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NATIONAL LABOR RELATIONS BOARD,

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HEARST PUBLICATIONS, INCORPORATED,

*Respondent.*

## BRIEF OF RESPONDENT IN NO. 338.

Respondent, HEARST PUBLICATIONS, INCORPORATED, publisher of the Los Angeles Evening Herald and Express,[1] presents the following brief in support of the affirmance of the opinion of the Circuit Court of Appeals.

## OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in 136 Fed. (2d) 608. [R. 1843. *et seq.*][2]

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[1]The publication is hereinafter referred to as the Herald-Express.

[2]References herein to pages of the record are designated: R. and to this petitioner's brief: Br.

## JURISDICTION.

The petition of the National Labor Relations Board for Writ of Certiorari, filed September 9, 1943, was granted on October 25, 1943. Jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347 (a).) and Sections 10(e) and (f) of the National Labor Relations Act (49 Stat. 449, 229 U. S. C. A., Secs. 151, *et seq.*), herein referred to as "The Act."

## PROCEEDINGS BEFORE THE NATIONAL LABOR RELATIONS BOARD.

The Los Angeles Newsboys Local Industrial Union No. 75, C. I. O., herein called the "Union", filed a petition for investigation and certification of representatives, on or about April 18, 1939, alleging that it was the proper bargaining representative of a unit consisting of "Newsboys who sell papers at main spots, full time corners and checkmen within the city limits of Los Angeles, California;" that such newsboys were employees of respondent and that the question of representation "is a question affecting commerce within the meaning of the Act." [R. 3, 4, 5.][3]

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[3] An amended petition was filed by the Union on or about Feb. 5, 1940, describing the alleged unit as

> "Newsboys who sell papers at main spots and checkmen within the City Limits of Los Angeles, California."

A second amended petition was filed by the Union on or about June 6, 1940, describing the alleged unit as

> "All mainspot newsboys, full time newsboys and checkmen who are engaged to sell the Los Angeles Evening Herald and Express within the City Limits of Los Angeles, California, excluding bootjacks, temporary, casual and part-time newsboys."

and further avering the alleged question concerning representation to be:

> "The company refuses to bargain with representatives of Union because it contends newsboys are not employees within the meaning of the Act."

By several orders, issued by the Board, the proceeding involving Respondent was first consolidated with cases involving two Los Angeles newspapers, and thereafter a third Los Angeles newspaper was brought into the consolidated proceedings.

This Respondent filed a motion to dismiss upon the ground among others, that the Board had no jurisdiction over Respondent; that it was not engaged in commerce within the meaning of the Act; and that no one of the newsboy members of said Union and no one of the newsboys within any description of the alleged unit was or is, in so far as his newsvending activities are concerned, an employee of Respondent. [R. 35.]

Respondent also filed an answer, denying (among other matters) that Respondent was the employer of any of the newsvendors, that the so-called unit was an appropriate unit, and that any question had arisen affecting commerce within the meaning of the Act. [R. 490.] Respondent's motion to dismiss was denied. A hearing was held before a trial examiner of the Board from June 10, 1940, to June 27, 1940, and thereafter the Board issued its decision and direction of elections, dated January 9, 1941 [R. 76, 121], concluding as a matter of law that a question affecting commerce had arisen concerning the representation of employees of Respondent [R. 119] and directing an election [R. 120] among the newsboys described therein to ascertain bargaining representatives. By a "Fourth Amendment to Decision and Direction of Elections," the Board amended that portion of its "Decision" purporting to define "full time" and "part time" newsboys. [R. 138.] On or about May 14, 1941, Respondent filed a challenge to the vote of each person attempting to vote, on all the grounds, among others, set

forth in its motion to dismiss. [R. 154.] On the same day an election was held within the group defined by the Board. The aforesaid blanket challenge was overruled in the Board's "Election Report." [R. 160.] Respondent thereafter filed objections to the conduct of the ballot and to the election report [R. 168], which were overruled. [R. 179.] Thereafter the Board, under date of July 30, 1941, certified the Union as bargaining representative of the newsboys in said unit. [R. 187, 196.]

Following the aforesaid "Representation Proceedings" under Section 9(c) of the Act, "Complaint Proceedings" were initiated against this Respondent under Section 10(b) of the Act by the filing of a complaint alleging that the Union was a labor organization within the meaning of the Act; that a unit composed of all employees of Respondent who are full-time newsboys and checkmen engaged to sell the Herald within Los Angeles, excluding bootjackers, temporary, casual and part-time newsboys was an appropriate unit; that a majority of such alleged employees had designated the Union as bargaining representative; that Respondent had failed to bargain collectively with said Union; and that such failure constituted an unfair labor practice affecting commerce within the meaning of the Act. [R. 245.]

Respondent filed a motion to dismiss the complaint on the grounds, among others, that the Board had no jurisdiction over Respondent; that it was not engaged in commerce within the meaning of the Act; that none of the members of the Union or of the unit was, in so far as newsvending activities were concerned, an employee of

Respondent, and that a refusal to bargain with such Union could not burden or obstruct commerce. [R. 251.] Respondent also filed an answer to the complaint, denying, among other things, that the newsboys were Respondent's employees; that the alleged unit was a proper unit; that Respondent had engaged or was engaged in unfair labor practices, and that any question affecting commerce had arisen. [R. 245.] Respondent's motion to dismiss was denied. [R. 331, 333.] This complaint proceeding was consolidated with a like proceeding involving Times-Mirror Company, publisher of the Los Angeles Times, by order of the Board dated Oct. 23, 1941. [R. 245.] A hearing on the cases was conducted by the Board's trial examiner on Nov. 10 and 12, 1941. A stipulation was filed to the effect that there had been no material change in the conduct of the Respondent's business since the hearing in the representation proceedings in June, 1940, and that if all the witnesses who testified in such representation proceedings were called in the complaint proceedings, their testimony would be substantially the same. Such stipulation expressly saved to Respondent all of its objections then and previously urged. [R. 280.]

Following the hearing, an intermediate report, dated Dec. 4, 1941, was filed [R. 287], to which Respondent filed exceptions. [R. 316.] After oral argument, the Board rendered its Decision and Order, dated Mar. 30, 1942, directing Respondent to cease and desist from its refusal to bargain with the Union, and upon request, to bargain collectively with such Union. [R. 331, 349.]

The last mentioned Order was brought on for review to the Circuit Court of Appeals for the Ninth Circuit, which Court set the order aside.

## STATEMENT OF THE CASE.

### Business of This Respondent and Its Method of Wholesale Distribution of Newspapers.

The business of this Respondent, the Los Angeles Evening Herald and Express, is a separate business enterprise wholly owned by Hearst Publications, Incorporated, which enterprise has no connection with the manufacture, publication, sale or distribution of other publications published by Hearst Publications, Incorporated. The newspaper was distributed principally in the metropolitan area of Los Angeles, and only 37/100ths of 1% of its circulation was distributed outside of the State of California. It is a six-day afternoon newspaper, having no Sunday edition.[4]

The wholesale distribution of Respondent's newspapers was accomplished by its Circulation Department, under the supervision of a Circulation Manager. Under the Circulation Manager were three Branch Managers, in addition to the Superintendent of Street Sales managing the downtown area. To facilitate the distribution of newspapers, five branches (three under the supervision of one Branch Manager) were maintained in outlying districts. Direct contact with the news vendors was made by so-called District Men, approximately sixty-eight in number. These District Men operated directly under the Superintendent of Street Sales, in the downtown district, or branch managers in the outside districts. The Superintendent of Street Sales, Branch Managers and District Men were employees of Respondent. [R. 547,

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[4]"Agreed Statement of Facts," Board's Exhibit No. 2 [R. 49, 50, 51, 52, 53, 54, 55, 56]—"Decision and Order" of National Labor Relations Board, dated March 30, 1942 [R. 331, 336, 337].

548, 549.] Newspapers were delivered from the main plant of the publisher in downtown Los Angeles by its own Transportation Department direct to retail vendors, including newsstands, drug stores, grocery stores and corner vendors and to the various branch offices.

The mail room routed the newspapers, tying some in bundles addressed to various locations and others were sent in bulk. From the mail room the papers were sent to the Transportation Department for delivery to the various sales locations or to the branch offices where they were picked up by other delivery trucks and taken to the various retail outlets within the branch office district.

The District Men worked a forty-hour, six-day week—seven hours a day Monday through Friday and five hours on Saturday. Consequently they did not start to cover their respective districts until approximately two o'clock P. M. each day (except Saturday.) At and after that time they usually rode on the trucks delivering the papers, but some covered their districts in their own automobiles or by other means. [R. 545, 573, 641, 644, 645, 649, 656, 657.]

The District Man's duties were to supervise a certain territory, to collect accounts for sale of papers from the newsvendors within his territory, to accept regulation of orders that might be given him by street vendors, increases or decreases, and to recover any vacancy that might occur as, from time to time, vendors dropped out of the business. [R. 548.]

In addition to the aforegoing districts, there was one "dealer territory." In this territory, the papers were sold direct to a dealer and he in turn re-sold them to corner vendors and other retail outlets in his dealer territory. [R. 1014, 1015.]

The Respondent also employed certain newsvendors for specific duties in relation to the delivery of papers. These men, termed "wholesalers" or "Checkmen" were usually but not always vendors engaged in the "full-time" business of vending newspapers. Due to the fact that many part-time vendors were not on their corners when the newspapers were delivered, they were delivered into the care of these wholesalers and the part-time and other vendors secured their papers from the wholesaler at the intersection when they were ready to commence selling. In this way the papers delivered for sale by part-time vendors and others were protected from loss or theft. Wholesalers were employed for this purpose by the Respondent or by the "dealer". The wholesaler delivered the papers to the other vendors and collected the wholesale purchase price therefor for the account of this Respondent or the dealer by whom he was employed. He received a flat wage for the stipulated service. He did not pass upon credit risks and was not responsible for and did not assume credit losses. The wholesalers conduct their selling activities for several hours before they perform any wholesaling services [R. 702, 783, 840] and continue selling after their wholesaling is completed, including checking in to the District Managers. [R. 703.] They have no wholesale duties to perform until the "off-spot" vendors arrive, at various times of the day until as late as 4:00 P. M. [R. 783.] Most wholesalers did not have any wholesaling duties to perform until after the "Night Edition" was delivered, the press time

for which was 3:30 P. M. [R. 702.] The passing out of the papers takes only two or three minutes [R. 785] and all the rest of the time the vendor engaged in his own business of vending newspapers and magazines. [R. 785.] These duties constituted the wholesalers only employment and were rendered apart from and had no connection with the wholesaler's own independent business of selling newspapers and magazines on his own account and risk. [R. 568, 604, 605, 606, 654.] In so far as these limited duties were concerned, the wholesalers were admittedly employees of this Respondent. Respondent has at all times been willing to negotiate with the representatives of wholesalers as such, and their status as such wholesalers is not here in dispute.

Neither this Respondent nor any of its Branch Managers or Districtmen kept or maintained any lists of the names of newsvendors to whom its newspapers were sold, but it did have payroll records containing the names of its wholesalers. The District Men kept route sheets which showed only the places where papers were left and the approximate number of papers delivered at such places. [R. 572, 573, 574.] Board's Exhibit 3 [R. 616 to 629], being a list of the names and selling locations of full-time newsboys and checkmen, was compiled while the hearing was in progress and at the request of the attorney for the Board and was secured by sending a man out into the districts to procure the names of the vendors. [R. 630 to 633, 1044.]

Out of the 2200 to 2500 street newsvendors selling Respondent's publication [R. 1033], Respondent is here concerned only with the newsvendors contained within the Board's definition of an appropriate unit,[5] alleged to number approximately 209. [R. 163.]

**Newsvendors' Territories.**

There has grown up, over a long period of time, in the newspaper business a custom of ownership of sales territories. Obviously, there can be no actual ownership of the corners upon which newsvendors operate, but there is and has been a recognition by both the newsvendors and the publishers of certain rights of occupancy of the corners, which rights are frequently and commonly bought and sold. [R. 1039, 1040.] Naturally, corners in the

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[5]The Board's Decision and Direction of Elections of January 9, 1941, as amended by "Fourth Amendment to Decision and Direction of Elections," found the following unit to be appropriate as to this respondent:

> "All full-time newsboys and checkmen who are engaged to sell the Herald within Los Angeles, California, excluding bootjackers, temporary, casual and part-time newsboys." [R. 112.]

The Fourth Amendment to "Decision and Direction of Elections," amended the definition of "terms" as used in the description of the unit as follows:

> "Thus defined with respect to the Los Angeles Evening Herald and Express, the term 'full-time' newsboy means a newsboy who regularly sells to the public five or more editions a day five or more days a week; the term 'part-time' newsboy means a newsboy who sells to the public less than five editions a day or who sells to the public any or all of the daily editions published by the Los Angeles Evening Herald and Express less than five days a week." [R. 139, 142.]

downtown district or on important intersections in the outlying districts have more value than less strategic locations. [R. 589, 590.]

Inasmuch as the unit fixed by the Board specifically excludes bootjackers, temporary, casual and part-time newsvendors, no evidence was introduced in this matter concerning the customs and practices of these newsvendors in the sale of newspapers. However, a bootjacker was defined as a newsboy who sells to the general public at places other than established corners or spots, and the terms "temporary" and "casual" were defined as having their ordinary meaning. [R. 112.]

As hereinabove noted, there are 2200 to 2500 newsvendors selling Respondent's newspaper, of which only about 209 sell from established corners or spots. Thus there are hundreds of newsvendors selling papers in Los Angeles from other than "established corners or spots" [R. 1033], which places had insufficient regular patronage to make them salable as business locations and, moreover, there were corners termed "established spots," which came within the same category.

In this respect, the business of vending newspapers differs not at all from other small businesses in that some locations have considerable value and some have little or no value.

In the downtown area, the corner rights for the sale of this Respondent's newspaper have considerable value and pass from one occupant to another by purchase and

sale.[6] The less profitable locations are often abandoned by their occupants and thus become "open." [R. 589, 595.] An "open" corner is, therefore, a corner upon which newspapers were more or less regularly sold in the past, or merely a corner upon which no other vendor is then selling. [R. 595.]

**Hours of Sale.**

At the time of the hearing in this matter, Respondent published six editions of its newspaper. The Press starting time on these editions determined their availability for sale. The Press starting time for the first edition was 9:00 o'clock A. M. and for the last edition 5:00 to 5:15 P. M. [R. 546, 547.] The time of the delivery of the various editions to the various newsvendors, of course, depended upon the location of the respective spots and the distance thereof respectively from the publisher's

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[6]Newsvendor Relish borrowed $100.00 from his brother to purchase his corner at Fifth and Spring in approximately 1934. [R. 736.] Newsvendor Bryant purchased his corner at First and Broadway in 1939 from Newsvendor Faber for $600.00 and sold the corner he formerly owned at Third and Broadway to Newsvendor Faber for $250.00. [R. 922, 923.] Newsvendor Schullman purchased his corner at Seventh and Spring Streets in 1925 from the former owner for approximately $1200.00. [R. 931.] Newsvendor Gallagher purchased his corner at Seventh and Main approximately twenty years before the date of the hearing for $300.00. [R. 939.] Newsvendor Newman purchased his corner at Fifth and Olive approximately fourteen years prior to the date of the hearing for $250.00. [R. 945.] Newsvendor Powers purchased the corner at Fifth and Spring from the daughter of the deceased former owner for the sum of $150.00. The Bill of Sale for the corner, prepared by the buyer's attorney, was introduced in evidence as respondent's Exhibit No. 5. [R. 481.] It was from this corner, owned by his brother-in-law, Powers, that the organizer of the Newsboys Union, Patrick Comorre, was selling at the time of the hearing. [R. 999 to R. 1002.]

plant or one of its branch offices. Thus, the first edition would be delivered at the various spots all the way from 9:30 o'clock in the morning [R. 598] to 10:30 o'clock A. M. each week day. [R. 638, 645, 647, 682.] The early editions were delivered by respondent's transportation system, and the orders for the respective corners were tied in bundles and dropped on the corners. [R. 645, 646, 682.] The newsvendors knew generally when the early editions would be delivered to the corners and were generally there to receive their orders. However, whether they were there or not, the papers were left on the corners. [R. 646, 647.] Subsequent editions were usually, though not always, delivered, when available, by districtmen. [R. 644, 682, 706.] Many newsvendors sold only the later editions. [R. 700, 711.] Most newsvendors continued selling until 7:00 to 8:00 o'clock P. M. [R. 686, 703, 711.]

Without exception, the supervisory employees of the Respondent, from the Circulation Manager down, testified that newsvendors were not required to and were not instructed to sell newspapers during or for any particular time. [R. 566, 567, 601, 638, 639, 645, 978.][7] District

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[7]District Man Joe Woods testified: "They (newsvendors) know what to do, they are their own boss, and I have never gone around there and bulldozed them or told them to get out and hustle. They came when they felt like it and they quit when they felt like it, and that is all there was to it. I have never told anybody what time to show up, or what time to quit, as long (15 years) as I have been around there." [R. 601.]

Branch Manager Albert W. Brewster testified: "There is no set rule for them. They are on their own. It is up to them to be there if they want to make any compensation for themselves." [R. 645.]

Men, who formed the only direct contact between the newsvendor and the publisher, did not begin supervision of their districts until 1:00 to 2:30 o'clock P. M. in the afternoon of each day. [R. 643, 681, 705.] Therefore, they did not know from personal observation when the vendors appeared on their corners in the mornings. [R. 645, 656, 682, 699, 705.] District Men "checked in" or collected the wholesale price of newspapers, usually in the evening, from approximately 6:00 o'clock P. M. to 8:00 o'clock P. M. [R. 651, 686, 711.] Consequently, they could not personally observe when all vendors quit selling in the evening.

The Branch Managers had no instructions from the Circulation Department as to the hours papers were to be sold [R. 637], and gave no instructions to vendors in this respect. [R. 645.] It is clear that these hours varied widely, depending on deliveries and the number of editions sold. Under the Board's definition of the unit involved R. 112 139, 142], a "full time" newsvendor was one who sold five or more editions per day, five or more days a week. If he sold all editions, he would get his first editions anywhere from 9:30 o'clock A. M. to 10:30 o'clock A. M. and his last edition anywhere from 5:30 o'clock P. M. to 6:30 o'clock P. M. [R. 546, 547, 685.] If he sold only five editions, he would start later or quit selling earlier, depending on which edition he omitted.

## Methods Used by Newsvendors in Attracting Customers.

The methods used by newsvendors in attracting customers were devised by the vendors themselves. No instructions were ever given by representatives of this Respondent in this respect. [R. 595, 600.]

## Display of Herald-Express and News.

The testimony shows that as a result of conferences between representatives of the Herald-Express and the News, it was decided that, on and after August 25, 1937, neither organization would object to the sale of both these competing newspapers by the newsvendors if such vendors desired to sell both. [R. 555, 1012, 559, 560, 561.]

Shortly thereafter friction arose between the Districtmen for the respective newspapers over the matter of display of these competing publications. Accordingly, the circulation managers of the two newspapers attempted to agree upon some fair method of display of both newspapers and came to an understanding ". . . . that it would be well to have the News folded on the outside of the Herald . . . . so this appeared to be a fair arrangement and we asked the newsboys in general to cooperate with us to that end." [R. 563.]

When representatives of the News complained to the Circulation Manager of the Herald-Express that newsvendors were not giving the News proper display, he ". . . . notified the branch managers to instruct his district managers to talk to the newsboys, telling them that

that was not fair, not in accordance with the understanding, and to give the News their outside display." [R. 564.]

Several newsvendors testified to conversations regarding the method of holding the two competing newspapers, which took place at or about the time newsvendors commenced to sell both newspapers in 1937; but there was no testimony concerning any discussions or suggestions concerning the display of these newspapers in the years intervening between 1937 and June, 1940, the date of the hearing before the Trial Examiner.

## Display of Advertising Matter.

The record discloses that the Circulation Department of the Herald-Express had distributed display cards since 1920, to advertise features and events in the newspaper. These cards aided considerably in increasing and holding the circulation of the paper. They were prepared at the expense of the Respondent and newsvendors were charged nothing for their use. The cards had been used so long no instructions were necessary as to their use. [R. 1034, 1035, 1036.] That such cards did increase the sale of the newspaper and thus augmented their earnings was admitted by the vendors. [R. 768, 813, 839.]

## The Newsvendors' Profit.

Newsvendors purchased their papers at wholesale and retailed them at a higher price, making the difference as their profit. Title to the newspapers passed to the vendors upon delivery and they bore the loss for any papers lost, stolen or otherwise unaccounted for. Likewise, they extended credit to retail purchasers on their own responsibility and assumed all credit losses.

The vendors had "established" or "base" orders, which orders could be regulated from day to day. In the downtown district and some other districts, where adequacy of transportation permitted, orders were also regulated from edition to edition. Thus, during the period in question, Respondent made thirteen "deliveries" and "follow-up deliveries" per day in the downtown district. [R. 1048, 1049.] There was no comparable distribution in outlying districts; consequently changes in base orders, received after the papers had already been dispatched, could not be made until the next day. [R. 1049.]

Extra papers, over and above the "standing" or "base" daily order, were made available by the District Man from the truck delivering each edition. [R. 1051.]

If an unusual news story broke, efforts were made by the Circulation Department to ascertain probable extra requirements by telephone canvass of the Superintendent of Downtown Street Sales and Branch Managers and District Men working under them. This canvass, in a large measure, determined the printing of "extras" of each edition. [R. 1046, 1047.]

The "base" order did not represent a minimum required to be sold, as even such base orders varied from day to day, the Saturday order being invariably much lower than the orders on other days. A base order simply represented ". . . a form of intelligent shipping directions . . ." and provided information for determining the number of papers to be printed and distributed. [R. 1045, 1046.]

A base order actually represented the regular sale of a particular corner. This more or less regular street

circulation did not necessarily mean that the same number of papers were sold each day to the same individuals, but, with a considerable degree of regularity, many of the buyers were the same each day. When a news story broke that was of prime interest, the sales on each corner increased considerably and that accounted for the daily fluctuation in sales on the corner. This fluctuation did not, however, affect the number of sales to the regular customers. [R. 1045.]

Due to the uncertainty of news breaks and the rapidity of printing and distribution, there was no way in which individual newsvendors' possible orders of extras could be ascertained in advance, but some information as to possible requirements were secured by the telephone canvass above mentioned. Consequently, when the District Men went out on their routes, they carried the corner vendors' regular orders and, in addition, a quantity of extra newspapers, sufficient to supply the estimated extra requirements of the vendors. In the event the corner vendor was off his corner or other reasons did not permit the ascertainment of the vendors' exact requirements, the District Man would, as a matter of course, drop off sufficient extra papers to meet the estimated demand. In the downtown district where return of all unsold papers for credit was accepted by Respondent, the vendors were requested to carefully regulate their orders to avoid waste of newsprint. [R. 1032.]

In some of the outlying districts, returns were not accepted. Consequently, it was up to the vendor to regulate his base order and his orders for papers over and above his base order so that he would not sustain loss. In this instance again, however, regulation of the base order would be made from edition to edition, if time and dis-

tribution facilities permitted. [R. 648, 649, 709, 1048, 1049.] However, all unsold "Extras" were returnable for credit, in all districts. [R. 709, 710, 851, 944, 952.]

**Sales of Other Publications.**

Every newsvendor testifying in this matter admitted selling, in addition to Respondent's publication, at least one of the competing publications. The Board found that as a general practice newsboys sold more than one newspaper and handled magazines. [R. 106.] In addition to the Herald-Express, most newsvendors testifying in this matter, sold the News, the Examiner, the Times, and one or more of fourteen other newspapers and magazines, including Liberty, Collier's, Saturday Evening Post, Look, The People's World, Los Angeles Daily Journal, Wall Street Journal, Time and "Ham and Eggs." Some of them sold "New Year Editions" of newspapers competing with this Respondent's publication, and "Rose Bowl" post card folders and souvenirs. [R. 714, 718, 727, 744, 746, 793, 818, 830, 841, 849, 866, 875, 879, 896, 922, 932, 940, 945, 981, 1027.]

**Other Business Activities.**

Newsvendor Kahn admitted that during the time he was engaged in selling newspapers on his corner, he was also engaged in "book-making" activities, that is, taking bets on horse races. [R. 905, 907.]

Vendor Relish, for a year or two prior to the date of the hearing, had been engaged one to three times a week during the hours of publication of Respondent's publication, on at least five enumerated downtown corners, in delivering and selling to newsstands and customers two Jewish language newspapers, the "B'nai B'rith" and the "Jewish Voice." [R. 977, 978.]

## Employment of Assistants by Newsvendors.

Newsvendors on the more profitable corners hired assistants, paying them by the hour or on a commission basis. They hired and fired such assistants at will and made their own arrangements as to hours of work and compensation. Newsvendors, generally, hired their own relief men and made their own arrangements as to compensation.[8]

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[8]The witness, Schullman, employed five assistants to whom he paid a commission [R. 931] and testified that he had the right to and did hire and fire them at will [R. 937.] Witness Gallagher employed five assistants on a commission basis [R. 939], and stated that he had employed at least five assistants at all times during the twenty year period in which he operated on his corner and that at no time had a district manager ever said anything to him concerning his employees. [R. 943.] The witness Klein testified that he employed two boys who worked after school; that he had a delivery route, in addition to his corner, and he paid one boy thirty-five cents an hour to cover his corner while he took care of his route, and the other boy worked traffic for him at thirty-five cents an hour. He paid his relief man according to the hours worked at the rate of thirty cents an hour. [R. 982.] The witness Spillers also employed one assistant [R. 882]. The organizer of the Union, Pat Comorre, sold papers for his brother-in-law, Powers, who owned the corner. [R. 1009.] The witness, Nickerson, operated the same corner for the owner during the owner's illness and after the owner's death his daughter sold the same to Powers. [R. 1008.] The witness Comorre sold newspapers every evening on Powers' corner; he would work the corner and Powers the traffic zone or vice versa; his eldest boy also worked the corner; he never asked anyone's permission for himself or his son to sell papers on that corner and Powers hired and fired his own assistants. [R. 1004, 1005.] The witness Relish picked his own relief man, who also worked for Relish several hours a day once or twice a week while Relish was away. [R. 738.] The witness Faber testified he picked his own relief man and paid him a regular stipulated wage for that service. [R. 720.] The witness Gish sold papers at Sixth and Spring streets for the owner of that corner and regularly sold the Examiner and Times in the morning. [R. 741, 743.]

## I.

## NEWSVENDORS ENGAGED IN VENDING THIS RESPONDENT'S NEWSPAPER, UNDER THE CIRCUMSTANCES DISCLOSED IN THE RECORD IN THIS CASE, ARE NOT, IN SO FAR AS THEIR NEWSVENDING ACTIVITIES ARE CONCERNED, EMPLOYEES OF THIS RESPONDENT WITHIN THE MEANING OF THE ACT.

### 1. The Meaning of the Word Employee Is a Judicial Question, and the Determination by the Board of the Status of Vendors in This Case Is a Conclusion of Law Which Is Not Binding on the Court.

The Board found "as a conclusion of law" that by refusing to bargain collectively with its employees in an appropriate unit, the Respondent had engaged in an unfair labor practice within the meaning of Section 8(5) of the Act. [R. 475.] However, if the newsvendors are not employees and this Respondent is not their employer, there was and can be no unfair labor practice or violation of the Act, and the Board was without authority to proceed under Section 10 of the Act.

There seems to be general unanimity among the Courts on the principle that administrative determinations of law are subject to complete review by the Courts.[9] If the finding by the Board of employment is a conclusion of law, the same is subject to such complete review.

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[9] *Brotherhood of Railway and Steamship Clerks, etc. v. United Transport Service Employees* (U. S. App. D. C.), 137 Fed. (2d) 817, 820; *Warner Co. v. Norton* (C. C. A. 3), 137 Fed. (2d) 57, 58; *Jacksonville Paper Co. v. National Labor Relations Board* (C. C. A. 5), 137 Fed. (2d) 148, 150.

The distinction between a finding of fact and a conclusion of law may usually be determined by a consideration of the means by which a result is attained. Thus, if from the evidence, the result can be reached by the process of reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such. If, on the other hand, resort must be had to the processes of the law in order to reach a final determination, the result is a conclusion of law.

We submit that the determination of the meaning of the word "employee" compels a resort to the processes of the law, and that hence the determination of that meaning is for the Courts.

Counsel for the Board contend that ". . . whether *particular facts* brought a person within statutory language was a matter of judgment on which the decision of the administrative official was to be accepted; if supported by evidence in the record . . ." (Petition for Certiorari, p. 16.)[10]

In other words, that having arrived at certain "particular facts," by the process of reasoning adapted to the investigation of truth, the Board was authorized to construe the statute, determine its scope and extent, the legal meaning of the words and phrases used therein, and to determine, upon the basis of the "particular facts" already found by it, that such facts brought a person within statutory language, *i. e.*, that such person was an employee within the meaning of the Act. We think it clear that in order to determine whether certain facts bring

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[10]Emphasis here and elsewhere throughout this Brief, ours unless otherwise noted.

a person "within statutory language," the meaning of that language must first be determined, and that determination can only result from application of the processes of the law.

Justice Waller, of the Fifth Circuit, stated the principle as follows:

> "It is not for this Court to say that the Examiner and the Board were in error in believing the testimony of one witness over another. That is the peculiar province of the Board. But the Court is not without power to interpret or construe the testimony of the witnesses whom the Board and the Examiner have chosen to believe. It is within the province of the Court to determine whether or not words spoken and actions taken amount, as a matter of law, to unfair labor practices under Section 8 of the Act."[11]

This same principle was followed by the Supreme Court of the State of California, in a case determining the status of "newsboys" under the Workmen's Compensation Act of that State. The Act provided that the findings and conclusions of the Commission on questions of fact were final and conclusive.[12]

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[11] *Jacksonville Paper Co. v. National Labor Relations Board*, 137 Fed. (2d) 148, 150 (Cert. Den. 64 S. Ct. 84).

To the same effect: *Brotherhood of Railway and Steamship Clerks, etc., v. United Transport Service Employees of America* (C. C. A. D. C.) Aug. 2, 1943, .....Fed. (2d) .....; *Warner Co. v. Norton* C. C. A. 3), 137 Fed. (2d) 57, 58.

[12] Stats. of Calif., 1917, Chap. 856, Sec. 67 (now incorporated in Sec. 5953, Labor Code of Calif.), in part, as follows:

> "The findings and conclusions of the Commission on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and conclusions of the Commission ....."

However, the Court held the applicant not to be an employee within the definition contained in the Act[13] and stated:

> "We are satisfied that the finding of the Commission upon the undisputed facts presented before it amounted to an erroneous legal conclusion which this Court possesses jurisdiction to review."[14]

When the question was again presented to the State Courts, in a "newsboy" case, the principle was reiterated as follows: The sole question presented to the Commission

> "and to this Court is a question of law as to whether the injured newsboy came within the category of a compensable employee, within the meaning and intent of the Workmen's Compensation Act, or at the time of his injury, he occupied the relation analogous to that of independent contractor in the vending of the newspapers."[15]

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[13]Stats. of Calif., 1917, Chap. 856, Sec. 8(a). "The term 'employee' as used in Sections Six to Thirty-one, inclusive, of this Act shall be construed to mean: Every person in the service of an employer as defined by Section Seven hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written."

[14]*New York Indemnity Co. v. Industrial Accident Commission*, 213 Cal. 43, 49, 1 Pac. (2d) 12, 15.

[15]*Hartford Accident and Indemnity Co. v. Industrial Accident Commission*, 123 Cal. App. 151, 153, 10 Pac. (2d) 1035, 1036. See also *Maltz v. Jackoway-Katz Co.* (Mo. 82 S. W. (2d) 909, 913; *Leigh Aitchison, Inc. v. Industrial Commission* (Wis.), 205 N. W. 806, 808.

The Court annulled the award of the Commission, saying:

> "The finding of the Commission upon the facts present before it amounted to an erroneous legal conclusion whch this Court possesses jurisdiction to review."

At the time of the passage of the Act (1935), the legislative device of curtailing judicial review was not new and untried legislation. The provision had been a feature of many Workmen's Compensation Acts and like legislation for many years, and was familiar both to members of Congress and to State Legislators. For instance, such a provision was added to the Compensation Act of the State of California in 1917, and its non-application to a determination of employee status adjudicated as early as 1931.[16] The Courts of California and other states have consistently held that a reviewing Court, bound by the fact findings of an administrative body, if supported by substantial evidence, is not bound by a finding that such facts establish an employer-employee relationship, because that is a conclusion of law to be determined by the

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[16] *New York Indemnity Co. v. Industrial Accident Commission, supra.* See also *Hartford Accident and Indemnity Co. v. Industrial Accident Commission* (Calif.), 10 Pac. (2d) 1035, 1036; *Maltz v. Jackoway-Katz Co.* (Mo.), 82 S. W. (2d) 909, 913.

Courts.[17] Congress must be presumed to have used the clause in the sense established by judicial decisions thereon.[18] In directing that "The findings of the Board as to facts if supported by evidence, shall be conclusive."[19] Congress must have intended to limit the conclusiveness of the Board's findings to those findings already established by the Courts as factual. Certainly it cannot be urged, in view of the judicial history of similar clauses, that Congress, in drafting the clause in the usual and customary language of such clauses, intended to extend the conclusiveness of the Board's findings to matters already well established by judicial definition as matters of law. Nor did it intend to substitute the judgment of the Board on such matters for the judicial judgment of the Courts.

We do not believe that the limitation of judicial review of administrative findings discussed in *Gray v. Powell*[20] militates against this view. The Bituminous Coal Act of 1937 provided a means of exempting from its provisions coal produced by a consumer. This Act exempted

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[17]*Miller & Lux, Inc. v. Industrial Acc. Comm.*, 179 Cal. 764, 178 Pac. 960, 961 (1919); *Angel v. Industrial Comm.*, 64 Utah 105; 228 Pac. 509, 510 (1924); *Maltz v. Jackoway-Katz Cap. Co.*, 336 Mo. 1000; 82 S. W. (2d) 909, 913 (1935); *W. T. Congleton Co. v. Bradley*, 259 Ky. 127; 81 S. W. (2d) 912, 914 (1935); *Krause v. Dept. of Labor* (Wash.), 97 Pac. (2d) 1082, 1083 (1940); *Van DeGarde v. Osceola County Coop. Creamery Assn.* (Iowa) 4 N. W. (2d) 234, 236 (1942); *Williams v. Brannum* (Okla.) 134 Pac. (2d) 352, 354 (1943).

[18]*Aetna Life Insurance Co. v. Hooker* (C. C. A. 6), 62 Fed. (2d) 805 (Cert. Den. 77 L. Ed. 1494); *Haskell v. Aluminum Co. of America* (D. C.—Mass.) 14 Fed. (2d) 864, 867; *Eastman Kodak Co. v. District of Columbia* (U. S. C. A.—D. C.) 131 Fed. (2d) 347.

[19]Sec. 10(e) of the Act.

[20]314 U. S. 402.

"coal consumed by the producer"[21] and further provided for a hearing by the Commission upon verified application of the producer to determine that certain "commerce in coal is not subject to the provisions" of the Act.[22] A previous Act passed in 1935 had defined "Captive Coal," that is producer-consumed coal, but in the 1937 Act a proposed definition inserted in the Senate had been stricken out in conference. Here was an Act regulating a single industry, designed to remedy chaotic conditions in the bituminous coal market. It was apparently believed by Congress that producer-consumed coal did not have a disturbing effect on such market. But it also apparently believed that the question of what constituted "consumer-produced coal" which would not disturb the market could best be decided by experts in the coal marketing field. It, therefore, expressly delegated that determination to the Commission, and it deliberately refrained from attempting to define the term itself. This term had no particular history, judicial or legislative. The type of regulation contemplated by the Act was comparatively new and untried. Previous legislation had failed. And apparently Congress had determined that its definition of "Captive Coal" in the 1935 Act was ineffectual. There could be, therefore, no contention that the words "coal consumed by the producer" had any well-known or judicially established meaning and Congress was manifestly uncertain as to what coal should be included within the language used. The express delegation by Congress of the power to determine the scope and extent of the exclusory words is the

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[21]Sec. 4-II(1)—50 Stats. at L. 72—Chap. 127.

[22]Sec. 4-a.

feature of the case which differentiates it from the case at bar. The Bituminous Coal Act of 1937 is intended, as its title indicates, to regulate the sale and distribution of *bituminous* coal in interstate commerce. If the National Bituminous Coal Commission created by the Act of 1937 would now hold a hearing at which it would determine that Congress, though it used the word *bituminous*, intended to regulate the sale and distribution of all coal, and that consequently the Commission's jurisdiction and control extended to the complete series traceable from the cellulose of wood through brown or lignite coal, soft or bituminous coal, hard or anthracite coal, to and including the final product of that decomposition, graphite, a situation more comparable to the action of the Board in this case would be presented. Evidence that bituminous coal is actually an intervening product between cellulose and graphite, and closely related in structure and essence to those products, that the waste of cellulose, lignite, anthracite and graphite, might "waste the coal resources of the Nation and disorganize, burden and obstruct interstate commerce," followed by a statement of the Commission that "We do not herein pass upon the nature of (cellulose, lignite, anthracite, graphite) for other purposes but hold upon this record that (cellulose, lignite, anthracite, graphite) are within . . . this Act," would hardly support the extension of the Commission's jurisdiction to those industries. Nor would the argument—Where anthracite and lignite dealers function in a realistic economic sense as members of the coal industry, Congress intended them to be within the Act,—carry conviction, in the face of the plain language of the Act. It seems clear that Congress granted the Commission jurisdiction only over the "bituminous" coal industry, and that the Com-

mission could not, by finding as a fact that anthracite and lignite are coal and almost the same as bituminous, arrogate to itself jurisdiction over and control of commerce in those fields.

The aforegoing illustration serves to point up the distinction between the action of the Commission, considered in *Powers v. Gray*, and the action of the Commission in this case, as we see it, viz: The Bituminous Coal Commission determined a matter expressly delegated to it by Congress, within the outer periphery of the jurisdiction granted to the Commission by and determined and limited by Congress. In the instant cause the Commission, without express or implied delegation by Congress of the right so to do, has arrogated to itself the power to extend the outer periphery of its granted jurisdiction beyond the limits fixed by Congress.

Congress delegated to the Bituminous Coal Commission not only the express power to determine facts, but the right, in a sense legislative, to fix and determine the standard or rule by which the facts found would be measured. In the instant cause Congress gave no express delegation of the power to determine whether any individual was or was not an employee and saved to itself and, by defining "employee," exercised its right to fix and determine the standard or rule by which the facts found would be measured.

In *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, the Court had before it the effect of a determination by the Interstate Commerce Commission, for the purposes of the Railway Labor Act,[23] that the railroad company was not

[23] 48 Stats. at L. 1185—Chap. 691—45 U. S. C. A., Sec. 151.

an interurban railway. The Railway Labor Act, applying to railroads engaged in interstate commerce, excepted any "interurban electric railway not a part of a general steam-railroad system," and expressly delegated to the Interstate Commerce Commission the right and duty "to determine after hearing whether any line operated by electric power" falls within the exception. However, an excepted interurban railroad became subject, in so far as the labor relations with its employees were concerned, to the National Labor Relations Act. The two Acts, the Railway Labor Act and the National Labor Relations Act, covered the entire field of railway labor.

Thus a determination by the Interstate Commerce Commission that a particular line was "interurban" and thus excluded from the Railway Labor Act, had the effect of a finding that the line was subject to the National Labor Relations Act. A determination that such line was not "interurban" would bring the line within the effect of the Railway Labor Act and within complementary exclusory language in the National Labor Relations Act. Hence such expressly delegated determination was exercised within the jurisdictional periphery of the two Acts and could not extend beyond the field of inquiry delegated to the Commission.

In *Rochester Telephone Corp. v. United States*,[24] the Court considered the determination of an administrative body that a telephone company was under the control of another and hence not within the exception contained in the Communications Act of 1934. The Act expressly invested that Commission with the duty of ascertaining "control" of one company by another.

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[24] 307 U. S. 125.

On the other hand, where Congress has not delegated such power, this Court has held its exercise not to be conclusive on the Court. In *United States v. Idaho*,[25] the Court had before it a determination by the Interstate Commerce Commission. The Interstate Commerce Act prohibited a carrier from abandoning any portion of its line without permission of the Interstate Commerce Commission, but provided that this "authority of the Commission" should not extend to the abandonment of a "spur" track. The railroad obtained permission from the Commission to abandon a certain line, the Commission holding that the latter was not a "spur" track. The lower Federal court considered the evidence before the Commission and new evidence and enjoined enforcement of the Commission's order, holding that the line was a "spur" track. The Court affirmed the granting of the injunction and said:

> "Appellants object that, since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive . . ."

The Court refuted this contention, saying:

> ". . . whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a state commission."

We submit that the question of "employee" status in this case is one of law, and that the same is subject to complete review by this Court, under the doctrine of *United States v. Idaho*.

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[25] 298 U. S. 105.

**2. The Definition of "Employee" Contained in the Act Shows Clearly the Intention of Congress to Use the Term in Its Ordinary and Conventional Sense, Except as Modified by Specific Inclusions.**

An examination of the definition of "Employee" in the Act clearly shows an intention to use that term in its ordinary and conventional sense. Although Congress used the term "workers" in Section 1 of the Act, this term did not and was quite apparently not intended to enlarge the scope of the Act. It will be noted that in all operative (as distinguished from the "recital" clause in Section 1) portions of the Act, Congress used the term *"employee."* Thus, in Section 2 of the Act, Subd. 3, the term *employee* is used in the definition. In Section 7, *employees* are given the right of self-organization, and in Section 8, the unfair labor practices described occurred only when an *employer* interferes with the rights of *employees* granted in that Section, or refuses to bargain with representatives of *employees.*

At the time of the passage of the Act, there were many strikes existing and threatened. Congress plainly desired to make the benefits of the Act available to employees on strike and to employees discharged because of Union activities. Moreover, Congress was well aware of the craft character of some Union organizations and the necessity of making available to such crafts the benefits of united action of a group of employees not necessarily employed by a single employer. Congress then declared, in Section 2 of the Act, the term "employee"

(a) Shall include any employee, and

(b) Shall not be limited to the employees of a particular employer unless the Act explicitly states otherwise, and

(c) Shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of an unfair labor practice and who has not obtained any other regular or substantially equivalent employment,

(d) But shall not include any individual employed as an agricultural laborer or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

It seems apparent that the use of the language hereinabove set apart in subdivisions (b) and (c) clearly expresses the intention to use the word in its ordinary and conventional sense. If this were not so, and if it was intended that the meaning of the word be extended to the limits of administrative imagination, there would have been no need for the express language hereinabove set apart. Congress realized that the word "employee," in its conventional and ordinary significance, might not encompass an employee whose status as such had ceased by reason of discharge, and certainly there must have been uncertainty as to the employee status of strikers. Congress dispelled any doubts on these scores by expressly including in its definition the individuals in these classifications. Congress just as carefully extended the benefits of the Act to employees as a class, rather than limit the sanction of concert of action to the employees of a single employer. It then, in the exercise of its legislative discretion, excluded certain employees, not because of any doubts of their status as such, but because Congress did not wish to extend the benefits of the Act to the employees in the named categories. Thus, the first part of the definition and the exclusion clause follow a familiar

pattern, duplicated in many other state and Federal enactments. The balance of the Section demonstrates the clear expression of the desire of Congress to extend the usual, common and accepted meaning of the term to include certain specific classes of individuals who would otherwise be excluded, and imposes a precise and carefully limited inclusion. Under familiar rules of statutory interpretation, the inclusory language above noted forbids interpretative extension beyond the limit set by Congress.

**(a) Except as Congress Has Written Into the Act Different Standards, the Federal Rules Protecting the Federal Rights Created by the Act Are Fashioned From the Common Law.**

In *Bailey, Adm'x v. Central Vermont R. R. Inc.*, 319 U. S. 350, 352, the Court said:

> "The rights which the Act (Federal Employers' Liability) creates are Federal rights protected by Federal rather than local rules of law (citing authorities) and those Federal rules have been largely fashioned from the common law (citing authorities), except as Congress has written into the Act different standards (citing authorities)."

**(b) The Legislative Authority Uses Words in Their Ordinary Sense and With the Meaning Commonly Attributed to Them.**

In *U. S. v. First Nat'l Bank*, 234 U. S. 245, the Court said at page 258:

> "That this *natural and usual signification* of plain terms is to be adopted as the legislative meaning in the absence of a clear showing that something else was meant, an *elementary* rule of construction frequently recognized and followed in this Court."

In *Von Weise v. Commissioner of Internal Revenue* (C. C. A. 8), 69 Fed. (2d) 439 (Cert. Den. 292 U. S. 665), the Court said:

> "One of the cardinal rules for construing statutes is that the words used are to be given *their common-ordinary meaning* in the absence of indication in the statute or in the surrounding circumstances to the contrary; but if a definition of the word is given in the statute, that definition is controlling."[26]

**(c) Where Words Used in a Statute Have Received Judicial Definition, the Legislative Authority Will be Presumed to Have Known of Such Definition and to Have Intended the Words to Receive the Same Construction.**

In *Kepner v. U. S.*, 195 U. S. 100, the Court, at page 124, stated the rule as follows:

> "It is a well settled rule of construction that language used in a statute, which has a settled and well known meaning sanctioned by judicial decision, is presumed to be used in that sense by the legislative body."

In *U. S. v. Merriam*, 263 U. S. 179, 187, the Court said:

> "The word 'bequest,' having the judicially settled meaning, which we have stated, we must presume it was used in that sense by Congress."

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[26]To the same effect see *McDonald v. U. S.* (C. C. A. 8), 89 Fed. (2d) 128, 133 (Cert. Den.—301 U. S. 697); *Sanborn v. Commissioner* (C. C. A. 8), 88 Fed. (2d) 134, 137 (Cert. Den.—301 U. S. 700); *Hearst Publications, Incorporated, et al. v. National Labor Relations Board*, 136 Fed. (2d) 608, 612. [R. 1848.]

In *Aetna Life Ins. Co. v. Hooker* (C. C. A. 6), 62 Fed (2d) 805 (Cert. Den.—289 U. S. 748), the Court said at page 806:

> ". . . . We think that the legislature must be presumed to have had knowledge of the fact of the earlier judicial definition and to have intended that the language used in the Act should be given exactly the same construction."

In *Haskell v. Aluminum Co. of America*, 14 Fed. (2d) 864, the Court said:

> "It seems to be too firmly established to admit of argument that in statutes affecting venue the word 'found' has been given a definite legal signification when applied to foreign corporations, and it will be presumed that when Congress enacted the Clayton Act, it used the word as defined by the Courts."

In *Eastman Kodak Co. v. District of Columbia* (U. S. App. D. P. C.), 131 Fed. (2d) 347, at page 348, the Court said:

> "It has been consistently held that, unless a different legislative intention appears, the geographical 'source' of income from the manufacture and sale or purchase and sale of goods is the jurisdiction where the sale is made. Congress must be assumed to have written the District Revenue Act in the light of the authorities."

**(d) The aforegoing Presumption Must be Indulged by the Courts.**

In *Levy's Lessee v. M'Cartee*, 6 Peters (31 U. S.), 102, 110, the Court stated the rule as follows:

> "The legislature *must be presumed* to use words in their *known and ordinary* signification, unless that sense be repelled by the context."

The Court below in this cause followed the rule so announced, saying:

> "Since the term 'employee' is not defined in the Act, we agree with petitioner's contention that it must be given its conventional meaning as developed under the common law and statutory enactments." [R. 1843, 1848.]

**3. In Construing Cognate Social Legislation Containing No More Specific Definition of the Word "Employee" Than Is Contained in the Act Here in Question, the Courts Have Declared That Congress Used the Word in Its Ordinary Accepted and Conventional Sense.**

**(a) Social Security Act.[27]**

*Anglin v. Empire Star Mines Co.* (C. C. A. 9), 129 Fed. (2d) 914, 916:

"Applying the ordinary legal tests as the statute appears to have intended, the trial court concluded

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[27] Social Security Act, 53 Stat. 1400; Sec. 905(a); 42 U. S. C. A. Sec. 1011(b):

"The term 'employment' means any service of whatever nature performed within the United States by an employee for his employer, except . . . . (naming exceptions)."

that the Leasers were independent contractors . . . However, in defining the required relationship . . . the regulations do no more than reiterate the familiar principles of the common law."

*Williams v. U. S.* (C. C. A. 7), 126 Fed. (2d) 129, 132 (Cert. Den.—317 U. S. 655):

"It has been held by this and other courts that employment within the meaning of the statute connotes the legal relationship of employer and employee as those terms were defined and understood at the time of the enactment—furthermore, that an independent contractor is not an employee."

*U. S. v. Griswold* (C. C. A. 1), 124 Fed. (2d) 599, 601:

"We held that 'an employee is one who meets the test of the more or less established concept of the 'legal relationship of employer and employee.' . . .

"The relationship of employer and employee in the ordinary sense does not exist here."

*Deecy Products Co. v. Welch* (C. C. A. 1), 124 Fed. (2d) 592, 597:

". . . The words 'employ,' 'employer' and 'employee' are to be taken in their ordinary meaning. It seems clear that the question whether a person is an employee in all cases turns on the existence of the more or less established concept of the 'legal relationship of employer and employee.' "

*Jones v. Goodson* (C. C. A. 10), 121 Fed. (2d) 176, 180:

"It must be presumed that Congress was cognizant of its well-established principles at the time of the enactment of the statute and that if different guides were intended for ascertaining whether the relationship of employer and employee existed between parties in the application of the statute, appropriate language would have been used to indicate such purpose. There is nothing in the act or its legislative history which indicates such an intent."

*Indian Refining Co. v. Dallman* (C. C. A. 7), 119 Fed. (2d) 417:

"There is nothing in the Social Security Act which suggests that the terms 'employer' and 'employee' should receive anything but their *ordinary construction*."

**(b) Federal Employers' Liability Act.**[28]

*Robinson v. B. & O. R. R.*, 237 U. S. 84, 94:

"We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their *natural* sense, and intended to describe the *conventional* relation of employer and employee."

See, also:

*Hull v. P. & R. Ry. Co.*, 252 U. S. 475, 479;

*Wells Fargo v. Taylor*, 254 U. S. 175, 187.

[28]Federal Employers' Liability Act, 53 Stat. 1404, Sec. 1; 45 U. S. C. A., Sec. 51:

"Every common carrier . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . ."

**(c) Fair Labor Standards Act.[29]**

*Bracey v. Luray*, (C. C. A. 4), 138 Fed. (2d) 8, 10:

"It is elementary in the construction of statutes that words are to be given their 'natural, plain, ordinary and commonly understood meaning,' unless it is clear that some other meaning was intended . . ."

*Bowman v. Pace Co.* (C. C. A. 5), 119 Fed. (2d) 858, 860:

"The strongly contested issue is whether he was an employee of the Pace Company at all . . . It is not the purpose of the Fair Labor Standards Act to create new wage liabilities. . . ."

**(d) Federal Safety Appliance Act.[30]**

*Stevenson v. Lake Terminal R. Co.* (C. C. A. 6), 42 Fed. (2d) 357, 358:

"The Congressional failure to define the term 'employee' . . . . has evoked a large amount of litigation. . . . . and the Supreme Court has held that the term 'employee' in the Employers Liability Act describes the conventional relation of master and servant."

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[29]52 Stat. 1060, Sec. 3; 29 U. S. C. A., Sec. 203:

"'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . .

"'Employee' includes any individual employed by an employer."

[30]Federal Safety Appliance Act, 27 Stat. 531; 45 U. S. C. A., Secs. 1 to 46: This Act apparently contains no definition of the term.

**4. It Has Been Judicially Determined That Newsvendors Selling the Respondent's Publication Under the Conditions Disclosed by the Record Are Not, in so Far as Their Vending Activities Are Concerned, Employees of This Respondent.**

The Courts of last resort of various states have had occasion many times to consider the status of newsvendors, not only under the common law but under various forms of "social legislation," notably Workmen's Compensation Acts. As hereinbefore pointed out these Acts were remedial and liberally construed. Moreover, most of such Acts contained provisions making the findings of fact of the body administering the same conclusive upon the Courts. Such was the situation faced by the Supreme Court of the State of California, in *New York Indemnity Co. v. Industrial Accident Commission*, 213 Cal. 43, 1 Pac. (2d) 12; one of the earliest of such cases. The applicant was selling, among others, the newspaper published by this Respondent. The facts were stated by the Court as follows:

> "Eustace had for some time prior to his injuries been accustomed to have delivered to him from a district manager, acting as the representative of both publishing companies in the daily distribution of their respective issues to the newsboys within the district of which he was in charge, the newspapers of said companies. As to the 'Herald' each of these newsboys, including the applicant, paid two cents each for the daily issues of said newspapers, said payments to be made either at the time of receiving the specified number of papers, or at the close of the sales for the day. Eustace was accustomed to take 130 'Heralds' for each day. Any unsold portion

thereof was not returnable. As to the 'Record,' Eustace received as few or as many as he ordered, at the above price, and credit was given to him for returned copies thereof. The daily relations between Eustace and the publishers were created through his contact with the district manager. He was not upon the pay-roll of either publisher and received no salary or compensation directly from either. His daily profits, if any, consisted in the difference between the price paid or to be paid by him for the papers received and the price at which he was permitted by the publishers to sell the same to the purchasing public. There was some dispute in the evidence as to just what amount of control or regulation was exercised over newsboys by the district manager; but the evidence in that regard seems to go no further than the following extent, to wit: That certain specified corners or places upon the public streets were alloted, when unoccupied, to particular newsboys applying for the same, who received instructions from the district manager not to intrude upon or interfere with the corner or place allotted to another. Each particular newsboy was expected and in fact required to be active and vigilant in making sales of a prescribed minimum number of each of said newspapers at or near his designated place; in short, to be a 'hustler' in making sales. Otherwise his allotted place or corner would be given to another newsboy and he would be refused further copies by the district manager. The latter testified that one of his duties as such district manager in the employ of both publishers was to maintain a status of peace and harmony among the newsboys, and to so far supervise their daily conduct in the territory covered by his district as to promote the sale of the largest possible number of copies of each of said newspapers within the said district."

The Court said:

"We are thus brought to what we deem to be the essential inquiry in the instant proceeding, which is as to whether the nature and degree of control exercised by the publishers of the two newspapers involved in this proceeding, through their district manager, was such as would suffice to justify the finding of the Commission to the effect that newsboys, by virtue of such control stood in the relation of employees of the publishers of said newspapers, and as such have a compensable claim for an award arising out of injuries received in the distribution to the public at large of their daily product . . . we are constrained to hold that the limited amount of control which the publishers of these two newspapers undertook to exercise over the newsboys, including Eustace, who daily purchased from their district manager a specified number of copies of their daily issues, for a specific sum, payable in cash or at the close of each day's sales, and who undertook the retailing of the same to such customers among the public at large as they were able to attract or procure at a specified place and price fixed by the publishers, would not as a matter of law be sufficient to constitute such newsboys the employees of the publishers of said newspapers . . . We are satisfied that the finding of the Commissioner upon the undisputed facts presented before it amounted to an erroneous legal conclusion which this court possesses jurisdiction to review."[31]

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[31]Excerpts from the record in this case are included in the Appendix hereto.

The rule in the above case was followed by the Court in *State Compensation Fund v. I. A. C.*, 216 Cal. 351, 14 Pac. (2d) 306, and in *Hartford Accident & Indemnity Co. v. I. A. C.*, 123 Cal. App. 151, 10 Pac. (2d) 1035.

The same position has been taken by the Courts of California in cases not involving claims for compensation under the Workmen's Compensation Act.

*Bohanon v. McClatchy Pub. Co.*, 16 Cal. App. (2d) 188, 60 Pac. (2d) 510;

*Rathbun v. Payne*, 21 Cal. App. (2d) 49, 68 Pac. (2d) 291;

*Butt v. San Diego Pub. Co.*, 21 Cal. App. (2d) 429, 69 Pac. (2d) 216.

Like rulings on similar factual statements have been made by the Courts of other states.[32]

The National Labor Relations Board reached the same conclusion in the matter of *Houston Chronicle Publishing Company*, 28 N. L. R. B. 1043. As is shown by the record in the *Houston Chronicle* case, there was no material difference in the facts of that case and the facts of this case.[33]

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[32]*Call v. Detroit Journal Co.*, 191 Mich. 405, 158 N. 36; *Oklahoma Pub. Co. v. Greenlee*, 150 Okla. 69, 300 Pac. 684; *Joslin v. Idaho Times Pub. Co.* (Idaho), 53 Pac. (2d) 323; *Bernat v. The Star Chronicle Pub. Co.* (Mo.), 84 S. W. (2d) 429; *Birmingham Post v. Sturgeon* (Ala.), 149 So. 74; *Creswell v. Charlotte News Pub. Co.* (N. C.), 168 S. E. 408; *Florida Pub. Co. v. Lourcey* (Fla.), 193 So. 847; *Balinski v. Press Pub. Co.* (Pa.), 179 Atl. 897; *People v. Masiello*, 31 N. Y. S. (2d) 512.

[33]Quotations from the opinion, exhibits and record in this case are contained in the Appendix hereto.

The aforegoing cases used the conventional "control test"[34] in determining the status of the vendors in question. The record in this case shows no such power of control in this Respondent. It had no power or control over the *means* and *methods* by which vendors sold their papers. It cannot be doubted that it would be impracticable for the Respondent to attempt to control the *means* and *methods* of sale of several hundred vendors, scattered all over the City of Los Angeles, and the record in this case demonstrates that no such control was attempted to be exercised by the Respondent in this case.

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[34]Nothing in the record shows that respondent was in the position of a "master who has the supreme choice, control and direction of the servant, and whose will the servant represents, not merely in the ultimate results of the work, but in all details." (*Childers v. Commissioner*, 80 Fed. (2d) 27, 30.) The control in all details includes control by the employer of the means and method of performance. (*Fidelity & Casualty Co. v. Ind. Acc. Commission*, 191 Cal. 404, 216 Pac. 578.)

Such control as to means and method must be complete. (*Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 811.)

The same tests are applied in the Federal Courts. In *Radio City Music Hall Comp. v. United States*, 135 Fed. (2d) 715, 717, the Court considered whether performers in vaudeville acts were employees, for which the theater was required to pay tax. The Court said:

> "The test lies in the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said, though the regulation redundantly elaborated it. In the case at bar the plaintiff did intervene to some degree; but so does a general building contractor intervene in the work of his subcontractors. He decides how the different parts of the work must be timed, and how they shall be fitted together; if he finds it desirable to cut out this or that from the specifications, he does so. Some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees."

**5. The Relationship Between the Vendors and Publisher Herein Was That of Purchaser and Seller, and the Vendors Occupied the Status of "Sales Agent," as That Term Is Defined by the Courts.**

The fundamental error into which the Commission fell in this cause consisted in its failure to discern and give effect to the undoubted "sale" that underlies and gives form and color to the relationship existing between these newsvendors and the various publishers whose publications they sell.

While all Courts considering the problem have not clearly recognized the distinction, the newsvendor status is actually that of "sales agent," as that term is defined by the Courts, rather than that of independent contractor. In most cases involving newsboys, the Courts have approached the problem from the employee-independent contractor viewpoint, though in the leading case, *New York Indemnity v. Industrial Accident Commission*, 213 Cal. 43, 47 it was pointed out that the relationship

> ". . . while somewhat difficult of definition as that of an independent contractor, was more nearly allied to the relation of a sales agent, under the authorities to which we have been cited, than to that of an employee and employer as those terms are defined . . ."

The attempt to fit the relationship into the conventional frame work of "employee" causes considerable distortion, whereas if the relationship is viewed in, what we think to be, its proper perspective, all the elements, tortured and twisted by the Board into elements of "control," fit neatly and compactly into a relationship well known

in the law, and generally called a "sales agency," though it has little semblance of an agency in fact. The relationship is simply a sale of a proprietary article with a right of resale under terms and conditions fixed by the proprietor.[35]

The cases defining the relationship are numerous. Their number demonstrates not only the distinctive character of the relationship but its adoption into all fields of commercial endeavor in the United States.

The rationale of the cases is stated in *W. T. Rawleigh Medicine Co. v. Holcomb* (Ark.), 191 S. W. 215, as follows:

> "One might sell his goods to whom he pleased and might prescribe other exactions in regard to the price to be charged and the manner of reselling

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[35] *1 Mechem on Sales*, pages 41 and 42:

"A qualified form of 'agency' which has grown up in modern times is that which exists when the owner or manufacturer of patented or other proprietary articles grants the privilege of sale or of exclusive territory to one who otherwise might not be at liberty to sell the goods in question. It is entirely consistent with this arrangement that the so-called agent is to buy, of the proprietor or manufacturer, the goods which he is thus authorized to sell, and when this is the fact there is little more of 'agency' in the case than the name itself. It is also entirely consistent with the arrangement that the 'agent' is to sell the goods at a price or upon terms or conditions fixed by the proprietor or manufacturer. A person so situated is often, in popular language, said to have obtained the 'agency' for the goods, when all that is meant is that he has obtained a more or less exclusive right to buy and resell them in a prescribed territory. The transaction is simple enough, but the reports show many cases in which the parties have, perhaps, deceived themselves and have certainly attempted to deceive others by calling that an 'agency' which had no resemblance to agency in fact, but was simply a sale of a proprietary article with a right of resale under terms and conditions fixed by the proprietor."

without changing the character of the transaction as a sale."

While most of the cases arose in connection with the endeavor to fasten on the "sales agent" the character of an agent in fact and there are comparatively few cases involving a comparison between the status of "sales agent," and the status of "employee," the cases are nonetheless pertinent to this inquiry because there is no substantial difference between an agent in fact and a servant or employee.[36]

An examination of these cases discloses that all of the elements here relied upon by the Commission as indicating "control" of an "employee" are common and accepted features of a "sales agency" and do not affect the independent nature of the relationship.

The cases demonstrate that the following conditions of resale are common features of "sales" agencies and do not change the independent character of that sales relationship:

1. Sales are restricted to a certain territory.

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[36] *People v. Treadwell*, 69 Cal. 226, 236:

"True, the words 'agent' and 'servant' are not wholly synominal; *both, however, relate to voluntary action under employment and each expresses the idea of service.* The service performable by a servant for the employer may be inferior in degree to work done by an agent for his principal. A servant is a worker for another under an express or implied employment; so also is an agent, only he works not only for but in place of his principal."

2 *Corpus Juris*, 243:

"In general the principles governing the rights, duties and liabilities growing out of the two relations are the same, and to determine whether a given relation is one of agency or one of service is of no consequence. This results from the fact that the law of principal and agent is an outgrowth and expansion of the law of master and servant."

2. A place of business required to be maintained in the territory.

3. Agent required to diligently work in the sale.

4. Agent required to purchase not less than a specified number of articles during named periods.

5. Agent required to sell the articles at the regular retail price established by the manufacturer.

6. No lesser price be advertised.

7. Agent required to make personal canvass.

8. Agent required to keep complete records.

9. Agent required to report weekly.

10. Agent required to remit one-half of all collections.

11. Manufacturer furnishes blank reports.

12. Manufacturer reserved right to limit sales to agent.

13. Manufacturer gave specific directions how to conduct the business.

14. Manufacturer furnished a book on salesmanship.

15. Manufacturer agreed to accept all unsold goods at the termination of the contract.

16. Sales agent may purchase from manufacturer for cash or on credit.

17. Sales agent required to give his entire time to the business.

18. Manufacturer prohibited invasion of one agent's territory by another.

19. Agent required to pay one-half of cost of advertising in the territory.

20. Manufacturer had many agents engaged under the same arrangement selling the same articles in adjoining territories.

21. Agents generally supervised in their territories by an employee of the manufacturer.

22. Agent required to sell manufacturer's product exclusively.

23. Agent received compensation for procuring other agents.[87]

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[87]In the following cases the conditions of and requirements for re-sale hereinafter noted were held not to change the sales nature of the transaction nor to affect the independence of the sales agent:

*Reiter v. Anderson*, 87 Cal. App. 642, 262 Pac. 415:

Sale of sewing machines—territory restricted to one county; agent to maintain place of business therein; to diligently work in sale of machines and products; to purchase not less than 144 machines per year or 12 per month, at prevailing wholesale price; if agent orders from branch other than factory, agent to pay freight and drayage costs; agent to sell only at regular retail established price; agent not to advertise any but retail list prices.

*Sinnet v. J. R. Watkins* (Ky.), 282 S. W. 769:

Sales of medicines and merchandise.—Agent assigned to territory, required to make personal canvass; keep complete records; report weekly and remit one-half of collections; company furnished blank reports; reserved the right to limit sales and kinds of merchandise; gave specific direction how to conduct the business; furnished a book on salesmanship; addressed agent as salesman; agreed to accept all unsold goods on termination of contract.

*W. T. Rawleigh Co. v. Trerice* (Mich.) 195 N. W. 79:

Merchandise.—Agent required to give entire time to business, make detailed weekly report, sell only in certain locality determined by company. Many other sales agents in surrounding localities sold company's products under same arrangement. Company's representative solicited others to become agents, assigned territories for their operation and solicited their assistance in securing new salesmen, for which they were compensated.

*Standard Fashion Co. v. Cummings* (Mich.), 153 N. W. 814:

Dress patterns.—Sales agent agreed not to sell agency nor to remove it from original location without consent of company; not to sell or permit to be sold at such location, during contract term, any other make of pattern; not to sell patterns at less than label prices; company to have right to take account of pattern stock at will; agent to pay proper attention to sale of patterns; to conserve best interests of agency, and to reorder promptly all patterns as sold.

*W. T. Rawleigh Medical Co. v. Holcomb* (Ark.) 191 S. W. 215:

Medicines, extracts and other products.—Company agreed to sell, in such reasonable quantities as agent desired, above

As was stated in *Sinnet v. Watkins, supra*, it is optional with a manufacturer whether he carries on his business through employees or through sales to others

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products and a medicine wagon, partly on credit, agreed to repurchase at current wholesale prices all unsold merchandise; agent agreed to make weekly payments on account; was given exclusive territory, furnished with printed instructions and directions in regard to remittances of money; required to remit one-half of his receipts until his account was balanced. Company assigned exclusive territories to agents and no agent was permitted to invade the territory of another.

*Rosenbluth v. Hudson Motor Co.*, 265 Fed. 680:

Automobiles.—Company gave agent exclusive territory; agent agreed to sell at company fixed net prices within designated territory, subject to adjustment of commission of sale in another's territory, to be arranged under control of company; agent agreed to keep on hand repair parts, prices of which fixed by company; agent to pay one-half of cost of advertising in territory, such advertising to be approved by company; agent to sell company's product only.

To same effect:

*Mathews Conveyor Co. v. Palmer Bee Co.* (C. C. A. 6th) 135 Fed. (2d) 73, 78.

*Bessing v. Prince*, 52 Cal. App. 190, 198 Pac. 422;

*Piper v. Oakland Motor Car Co.* (Ver.), 109 Atl. 911;

*Bendix v. Staver Carriage Co.*, 174 Ill. App. 589, 28 Am. St. Rep. 811;

*Mack v. Drummond Tobacco Co.* (Neb.) 67 N. W. 174;

*Whitman Agricultural Co. v. Hornbrook*, (Ind.) 55 N. E. 502;

*McGraw v. Hanway* (Md.) 87 Atl. 666;

*Commercial Credit Company v. Girard Nat. Bank* (Pa.), 92 Atl. 44;

*Hogg v. J. R. Watkins Medical Co.* (Ark.), 288 S. W. 730;

*J. R. Watkins Medical Co. v. Hogue* (Ark.), 210 S. W. 628;

*Three States Buggy and Implement Co. v. Commonwealth* (Ky.), 105 S. W. 971;

*Barnes v. Maxwell Motor Sales Corp.* (Ky.), 189 S. W. 444;

*Arbuckle v. Kirkpatrick* (Tenn.), 39 S. W. 3;

*W. T. Raleigh Co. v. Van Duyn* (Idaho), 188 Pac. 945;

*Shores-Mueller Co. v. Palmer* (Ark.), 216 S. W. 295;

*E. A. Lange Medical Co. v. Johnson* (Ark.), 197 S. W. 1168;

*Raleigh v. Harper* (Wash.), 22 Pac. (2d) 665;

*J. R. Watkins v. Salyer* (Ill.), 49 N. E. 288;

*Hendricks v. International Harvester Co.* (Ver.), 135 Atl. 702;

*Poirier Mfg. Co. v. Kitts* (N. D.), 120 N. W. 558.

This Respondent, in the exercise of its undoubted right, has chosen to sell its product to newsvendors upon such conditions of resale as are necessary to the efficient vending of its product.

The aforegoing cases demonstrate that the imposition of such conditions of resale does not change the "sale" character of the transaction nor transform the independent vendors into employees.

**6. The Determination That the Vendors Selling Respondent's Publication, in Such Vending Activities Are Not Employees of Respondent, Is Not Affected by the Fact That Some of Such Vendors Received Compensation for Services Performed for Respondent, Separate and Apart From and Having No Connection With the Vendors' Independent Business of Selling Newspapers and Magazines.**

The duties of wholesalers have been fully described hereinabove. (See Statement of the Case, *Supra*, pp. 6 to 10.)

The salient points are these:

"That no newsboy receives checks from the petitioner, except and unless he performs functions as a wholesaler [R. 582]; that services as a wholesaler are rendered apart from and have no connection with the wholesaler's own independent business of selling newspapers on his own account and risk. [R. 606.] This is conceded to be so by the wholesalers themselves. [R. 781.] That wholesalers frequently conduct their selling activities for several hours before they commence their wholesaling activities [R. 702, 840], and that they continue their selling activities for some time after they have completed their whole-

saling activities, including checking in to the district managers. [R. 703.] Admittedly the wholesalers are paid a fixed salary by respondent and are carried on its payroll. These facts and others tend to indicate that the wholesalers, to the extent of their wholesaling activities, are employees of the respondent."

The Court below correctly concluded that, though it be conceded that the so-called checkmen are employees of the publisher to the extent that they function as wholesalers, they need not occupy the same status to the extent they function as newsboys. [R. 1851.]

The same conclusion was reached by the Seventh Circuit Court of Appeals in *Ridge Country Club v. The United States*, 135 Fed. (2d) 718, 720. The Court, in holding that in certain of his activities the golf professional was not an employee, although he was an employee in the performance of others, said:

> "The pro sustained a *dual* relationship to the club. Concededly, he was an employee as to the annual retainer, yet an independent contractor when he acted as a shopkeeper and instructor.
>
> "We have not overlooked the fact that these two capacities were bound together by a single contract and that one was dependent on the other. But, looking at the single issue as to the nature of the pro's relationship to the club when giving instructions or operating the shop, we think it clear that he was an independent contractor[38]."

[38]To the same effect see:
*State Compensation Insurance Fund v. Industrial Accident Commission*, 2 Cal. (2d) 94, 39 Pac. (2d) 201;
*Hedge v. Williams*, 131 Cal. 455, 457, 63 Pac. 721, 722;
*Kipp v. Oyster*, 133 Mo. App. 711, 114 S. W. 538;
*Stagg v. Taylor*, 119 V. 266, 89 S. E. 237.

**7. There Is No Substantial Evidence in the Record to Support the Conclusion of the Board That Vendors Selling Respondent's Publication Are, in so Far as Their Vending Activities Are Concerned, Employees of Respondent.**

**(a) A Finding of the Board Will Not Be Sustained When It Is Not Supported by Substantial Evidence.**

If, as a matter of law, a finding is not supported by the evidence it will be set aside by the courts.

*Stonewall Cotton Mills v. N. L. R. B.*, 129 Fed. (2d) 629.

Such finding must be supported by substantial evidence, *i. e.*, "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

*Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 83 L. Ed. 126, 140;

*N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469, 476;

*N. L. R. B. v. Sun Shipbuilding & Dry Dock Co.* (C. C. A. 3), 135 Fed. (2d) 15, 25.

Substantial evidence "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for a jury."

*N. L. R. B. v. Columbian E. & S. Co.*, 306 U. S. 292, 83 L. Ed. 660, 665.

**(b) The Board's Findings of Fact Were Based Upon Isolated Instances Affecting Only a Few Individual Vendors, and There Was No Testimony Whatever That Such Instances Were Matters of General Practice. Hence the Board's Conclusion That All Vendors Selling Respondent's Publication Are Employees of Respondent Is Not Supported by Substantial Evidence. Moreover, the Findings Relied on by the Board Do Not as a Matter of Law Support Such Conclusion.**

At the time of the hearing in this matter, there were approximately 2,200 to 2,500 vendors selling Respondent's publication in Los Angeles, on regular spots. This figure did not include newsstands, bootjackers,[39] temporary or casual vendors. [R. 1035, 1036.]

The Board found 219 vendors to be within the unit. [R. 116.] The number determined to be eligible to vote was 209, the number voting 179, and the number of ballots counted was 149. [R. 163.]

At the outset of the hearing, inquiry was made of counsel for the Board concerning the number of witnesses he expected to put on. He wired the Chief Trial Examiner in Washington for instructions and received the following wire:

> "Evidence should be introduced to show that persons signing cards are employees. Burden is on the petitioner to show this fact. I assume respondent denies card signers occupy the position of employees. If so, evidence should be introduced to show that each individual does." [R. 1493.]

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[39]Vendors who buy their papers from the publishing plant and sell them wherever they please. [R. 112—Note 35.]

Counsel for the Board offered 15 witnesses (other than employees of Respondent called by the Board) who sold Respondent's publication.[40]

Respondent called 5 vendor witnesses.[41]

The Board also called William J. Harrison, Circulation Manager, Dave Bell, Superintendent of Street Sales, Gordon F. Norton, "Dealer," Albert W. Brewster, Branch Manager, Jake Gratz, Branch Manager, and Harry Plotkin, Joe Woods, Solly Epstein and Louis France, District Men, out of the 68 district men employed by this Respondent.

Counsel for the Board offered in evidence 171 authorization cards purported to be signed by vendors within the alleged unit. [R. 914.]

Despite the instruction received from the Chief Trial Examiner and in the face of the warning of the Trial Examiner, delivered near the close of the testimony affect-

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[40]Sid Faber [R. 713 to 726].
Harry Relish [R. 726 to 739].
Harry Thomas Gish [R. 739 to 744].
Gene LeRoy Alley [R. 745, 816 to 829].
Arthur Steuart [R. 745 to 792].
David Kadesh [R. 793 to 816].
Phillip Spaminato [R. 830 to 848].
Mike Barrett [R. 848 to 853].
Patrick Comorre [R. 658 to 680, 853 to 865].
Louis Schwartz [R. 866 to 875].
Joe Roth [R. 875 to 879].
Charles C. Spillers [R. 879 to 895].
Sam Kahn [R. 895 to 917].
Gus Georgon [R. 1053 to 1059].
James V. Apice [R. 1117 to 1125].

[41]Ed Bryant [R. 921 to 929].
Willie Schullman [R. 929 to 938].
John J. Gallagher [R. 939 to 944].
Milton Newman [R. 944 to 957].
Maurice F. Nickerson [R. 1024 to 1030].

ing this Respondent, that evidence had not been introduced ". . . to show what each individual does." [R. 1513], no other or additional witnesses were called by the Board.

Although the Board made no effort in its "Decision and Direction of Elections" [R. 76 to 121] to separate the testimony applying to this Respondent from that applying to the other publishers involved in the hearing, it was recognized by the Board that testimony applicable to one publisher was not considered applicable to any other publisher, and the Board's attorney stipulated that the testimony offered in the other cases had no application to this Respondent.[42] Some of the testimony of employees of the News, in so far as it related to conversations had with representatives of this Respondent concerning the sale of both the Herald and the News by the vendors, was admitted against this Respondent.[43] So also certain testimony of a vendor claiming to be a member of the "News" unit, who also sold Heralds, was admitted against this Respondent.[44]

The attorney for the Board, the attaches of the local office of the National Labor Relations Board and the Union organizer and his committee were diligent and persevering in the preparation for the hearing of this matter. According to the number of authorization cards introduced in evidence, they had contacted and discussed the matter of representation with 171 vendors. It may be assumed that the attorney for the Board offered every

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[42]R. 1107, 1113, 1116, 1129, 1145, 1149, 1178, 1231, 1243, 1248, 1294, 1310, 1312, 1328, 1372, 1422, 1432, 1453, 1475, 1492, 1505, 1528, 1554, 1592, 1613, 1619, 1627, 1633.

[43]R. 1055 to 1079, 1079 to 1088.

[44]R. 1123 to 1124.

bit of evidence that industrious and diligent search could uncover. Yet there were only 15 vendor witnesses produced by the Board in the case involving this Respondent to testify to isolated instances of alleged "control." It will be noted that there was no evidence offered by the Board which tended to establish that the alleged instances of "control" were matters of general practice, and in fact most of such alleged instances were categorically denied by the representatives of Respondent alleged to have participated therein. On the other hand, when the Board questioned Respondent's representatives called by the Board, they testified that no such control existed. The findings of the Board and the lack of evidence to support the same are commented upon hereinafter.

*The Newsboy Customarily Obtains His Corner or Spot by Making Application at the Plant of the Publisher Where He Consults a District Manager. The Applicant Usually Inquires Whether There Is a Corner or Spot "Open."* [R. 95.] ". . . *district Managers of the Companies Allocate Corners and Spots.*" [R. 96.]

The testimony discloses [R. 590, 595, 606, 638, 696] that newsboys wishing to sell papers apply to district managers, in all parts of the city, for openings, meaning unoccupied corners where newspapers had customarily been sold, and if there is such a corner in the district the newsboy is furnished papers. The only district managers who work out of the main plant are the managers of the downtown area. [R. 590.] All others work out of

branch offices. [R. 638, 682, 696.] As hereinabove pointed out, "openings," that is, unoccupied corners, are seldom available in the downtown district, and if they are left vacant it is usually because they are unprofitable. [R. 599.] Profitable corners, on the contrary, pass from buyer to buyer for large sums of money, without the consent or knowledge of Respondent. [R. 1039, 1040.] The witnesses Relish [R. 736], Bryant and Faber [R. 924-926], Schullman, one time president of the Union [R. 930]; Gallagher [R. 939]; Newman [R. 945], and Powers and Comorre, the Union organizer [R. 199], all purchased their corners from previous owners. No one of these newsboys even thought it necessary to consult with representatives of the Respondent in such matters. The witness Comorre testified that the witness Powers bought his corner from the daughter of the deceased former own; that he (Comorre), Powers and Comorre's oldest son all worked the corner and that no one of them ever asked Respondent's representatives to consent to such arrangement. [R. 1004-1005.][45]

Of the 20 vendor witnesses called by the Board and this Respondent, seven had purchased their corners from previous owners.

This finding does not support a conclusion of employment. As pointed out hereinbefore (*supra*, pp. 48-51), the granting of territory by a company to a sales agent is an invariable feature of a "sales agency."

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[45]See also "Statement of the Case," *supra*, pp. 6-10.

Moreover, in the cases dealing with the status of newsvendors, the allocation of territory has been held not to constitute the vendor an employee.[46]

The evidence in this case discloses that if an individual wished to go into the newspaper business on an established spot, he could do it in one of two ways, viz.: buy a good corner from the owner or wait until a corner was abandoned and then take it over. (Of course, if he didn't want an established spot he could "bootjack" papers.) In the second instance, the easiest way to find a corner was to keep in touch with the district man concerning possible openings. In the case of vendor Barrett, he knew it was open so he asked a district manager if he "could take the spot over" and the district manager said "Sure" [R. 848, 849]. Then too, an abandoned corner could be taken over without the intervention of any district man. [R. 969.]

If the finding of the Board means anything other than the mere advising of prospective vendors of the existence of "open" or abandoned spots, it is not supported by the evidence.

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[46]See the following cases more particularly referred to in the Appendix:

*New York Indemnity Co. v. Industrial Accident Comm.*, 213 Cal. 43; 1 Pac. (2d) 12 (1931); *Birmingham Post Co. v. Sturgeon*, 227 Ala. 162; 149 So. 74 (1933); *Creswell v. Charlotte News Pub. Co.*, 204 N. C. 380; 168 S. E. 408 (1933); *Balinski v. Press Pub. Co.*, 118 Pa. Sup. 89, 179 Atl. 897 (1935).

In Matter of *Federal Ice & Cold Storage Co.*, and *Produce Drivers and Employees Union, Local No. 630*, 18 N. L. R. B. 161, 164, certain drivers of ice trucks were required to confine their operations to fixed territories and the Company refused to sell to drivers who failed to abide by this requirement. The Board, in finding that these drivers were *not* employees, declared that this is a "restriction . . . commonly placed on independent dealers by distributors . . ."

*"The Record Is Replete With Instances in Which District Managers Have Removed, Permanently or Temporarily, Newsboys From Their Corners or Transferred Them From One Location to Another, for Various Reasons."* [R. 100.]

Seven instances are cited in the "Petition for Writ of Certiorari" (p. 8) in this matter. The instances in question show only a reasonable refusal for cause to sell newspapers to certain vendors, or, as like instances were explained by the Board, in the matter of the Houston Chronicle, ". . . . it appears that in fact all that had happened is that their papers were given to other newsboys when they had gotten into trouble and had been unable to sell them."[47]

The record shows (exactly as in the *Houston Chronicle* case), that papers were refused one vendor who was drunk. When he sobered up, papers were again given him. [R. 601.] Papers were refused another vendor, when he failed or refused to pay for papers already purchased. Later on the matter was adjusted and papers were again furnished him. [R 901, 902.] Papers were temporarily refused a vendor when he persisted in selling them for less than the established price. [R. 878.] Another vendor was temporarily refused papers under the following circumstances, detailed by George Hutchinson, a district man [R. 1146, 1147]:

> "I came into the office there one day and found that there had been a report brought in there that he had made improper advances and attempted to molest a juvenile of the opposite sex. The person

[47] 28 N. L. R. B. 1043, 1045.

who had brought in the report and who threatened practically to take the law in his own hands was the girl's father. He said there was considerable feeling in that particular—around that particular neighborhood and corner over it, and there was likely to be some trouble over it; that he wanted to handle it legally. And just about that time we had had the rape and murder of these two little girls in Inglewood, and the city was more or less stirred up along those lines. Therefore I went out to the corner and I told Jimmy that he had best be taken off for the time being until we found out what it was all about; that naturally we didn't want him to wholesale our papers or to sell our papers if he was guilty of such a thing, *and that for his own self protection, it would be very poor policy for him to even hang around the corner for a few days.*"

Thereafter Mr. Hutchinson investigated the matter and, finding no substantial basis for the charge, again furnished papers to the vendor.

In another instance the owner of a drug store on the same corner occupied by the vendor in question, advised representatives of the Respondent that in an altercation in his store, the vendor had held him while another man had hit him over the head with an iron rod. The charge was investigated and it was deemed advisable to locate another corner for such vendor. A better corner was found for him, where he made more money. [R. 769.]

In another instance, a district man received repeated complaints from the owner of a grocery store and others of the uncleanliness and body odor of a vendor selling

in front of the store. The district man gave the vendor money for a bath and also gave him some of his old clothes. He suggested that the man clean himself up. (Action similar to this was characterized by the Board in the *Houston Chronicle* case as a "paternalistic attitude," not control. (28 N. L. R. B. 1043, 1048.) The vendor failed to comply and upon renewal of the complaints he was refused further papers. [R. 741, 743, 968, 972.] At the time of the hearing, this vendor was selling the Examiner and the Times in the morning and was relief man for the vendor owning the corner at Sixth and Spring streets in Los Angeles [R. 967, 969], selling the Herald, News and other publications.

The last instance cited was that involving the witness Relish, who had purchased the corner for $100.00 some six years prior to the date of the hearing. On or about December 21, 1934, a letter was received from the Downtown Business Men's Association, complaining about the activities of this vendor. [Herald Ex. No. 2—R. 483—introduced in evidence at R. 918.] Relish testified that he was told by the Herald Superintendent of Street Sales "that I would *have to get rid of my corner and in the meanwhile to put somebody to stay on my corner until I could get somebody to sell it and get rid of it* . . ." [R. 917, 918.] Relish, however, engaged an attorney who wrote respondent as follows:

> "Harry Relish, who sells magazines and newspapers at the northeast corner of Fifth and Spring

Streets, this city, *tells me that you discontinued selling him your papers* at the written request of the Downtown Business Men's Assn., the latter named being instigated by the Rowan Building . . ."

The attorney further charged a conspiracy to deprive his client of his livelihood. [Herald Ex. No. 4—R. 486—introduced in evidence at R. 1039.] The actvities of Relish and his attorney resulted in the sending of another letter to Respondent by the Association, informing Respondent that in view of the investment Relish had in the corner, he should be entitled to "recover his investment." [Herald Ex. No. 3—R. 485—introduced in evidence at R. 920.] Accordingly, Respondent continued to sell newspapers to Relish.

Only one of these refusals to sell papers was permanent, and that vendor started immediately to sell the Times and Examiner on another corner and to relieve for the regular vendor selling the afternoon papers on the same corner.

No one of these refusals was arbitrary, capricious or unjustified and, in most instances, the refusals grew out of altercations between the vendors and members of the public, a condition affecting the good will of Respondent's publication, in which it had a proper and natural concern.

The aforegoing instances, occurring over a period of five or six years, in a group averaging 171 to 219 vendors, show only isolated instances of reasonable refusal to sell

newspapers to independent vendors or "sales agents" and do not substantiate a finding that all such newsvendors or "sales agents" were subject to "removal at will."

In *Texas Co. v. Higgins* (C. C. A. 2), 118 Fed. (2d) 636, the Court considered whether a distributor for the Texas Oil Company was its employee under the Social Security Act. The Oil Company had the right to terminate the relationship on five days notice and to purchase the distributor's plant at cost. It was contended that thus the company had "absolute power over the business, because by this sanction it could not only intervene when and as it chose, but could direct the details of every move made." (P. 638.)

The Court denied this contention and held the distributor was not an employee. The Court, by Judge Learned Hand, said:

> "The character of the relation was determined by the rights and obligations assumed, and it is no answer that the plaintiff could force a change in these by threatening to terminate the agency. Assuming that Thomas would inevitably have complied with invasions of his rights secured by the contract—which is by no means certain and would obviously depend upon how burdensome these were—legally, the effect would be to force upon him *pro tanto* a new agreement. The plaintiff's power to end the agency was merely a power to free itself from all obligations; it was not a legal power to compel Thomas to assent to new proposals, and it might, or might not, be effective for that purpose. While the agency lasted the plaintiff had no control at all save that reserved

and Thomas was merely a factor receiving goods on consignment, and a factor is not an 'employee' but an 'independent contractor.'" (P. 638.)

Cases dealing with the newsboy status announce the same ruling.[48]

*"Generally the Newsboy Is Required to be at His Post From the Time Newspapers Customarily Appear on the Street to the Time Settlement Is Made."* [R. 98.]

A complete discussion of the testimony in the record concerning hours of sale is set forth hereinbefore in "The Statement of the Case," under the sub-head "Hours of Sale" (*supra*, pp. 12-14).

Although some newsboys testified that they were "required" to be on the corners between certain hours, most

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[48]In *New York Indemnity Co. v. Industrial Accident Comm.*, 213 Cal. 43; 1 Pac. (2d) 12, 14 (1931), each newsboy was "required to be active and vigilant in making sales . . . Otherwise his . . . corner would be given to another newsboy . . . . . " In *Birmingham Post Co. v. Sturgeon*, 227 Ala. 162; 149 So. 74, 75 (1933), if the newsboy failed to call for his first assignment of papers, another newsboy was assigned to his corner. In *Creswell v. Charlotte News Pub. Co.*, 204 N. C. 380; 168 S. E. 408, 409 (1933), if the newsboys did not stay on the beat assigned or were not active in their efforts to sell papers, "they lost their jobs." In *Bernai v. Star-Chronicle Pub. Co.*, .....Mo. App. .....; 84 S. W. (2d) 429, 431 (1935), if the newsboy failed to conduct his activities "to the entire satisfaction of the companies" then the latter could discontinue supplying him with papers. In *Balinski v. Press Pub. Co.*, 118 Pa. Sup. 89; 179 Atl. 897, 898 (1935), if the newsboy was habitually late at his corner, or sold on a corner assigned to another newsboy, or sold in front of drug stores selling the newspaper, or sold in excess of the fixed retail price, or sold the competing newspaper, or "failed to sell a sufficient number of newspapers," he was refused further newspapers.

Yet in none of these cases were these circumstances held to indicate an employee relationship.

Exercise of the right to discontinue dealing with a particular retail vendor was held not to be indicative of employer-employee status in *Matter of Houston Chronicle Publishing Company and Houston Newsboys Union, Local 456*, 28 N. L. R. B. 1043.

of them admitted that the most that had been told them was the hours they might expect to receive the various editions. Typical of this line of testimony is that of Joe Bryant, a portion of whose testimony was quoted and relied upon by the Board in its findings, as follows: "Bryant . . . admitted that he was not his own 'boss,' because he could not 'open . . . and close' whenever he wished and had 'to work specified hours.'" [R. 98, 99.] However, in the same examination, he testified that nobody ever specified the hours, but that had been "his understanding," and that "there was two or three of the Examiner told me the hours, and Joe Woods of the Herald told me what the hours were." [R. 928, 929.] On cross-examination he was asked the direct question ". . . isn't it a fact that what they told you was what time the editions came out, what time they hit the streets," to which he answered "That is right." [R. 929.]

Typical of the vendors' independence in this respect was the colloquy between the Circulation Manager and Schwartz, a member of the Union "Constitutional Committee." Schwartz phoned about 1:00 P. M. one day, to ask why the vendor was selling on his corner. Mr. Harrison testified:

> "Mr. Schwartz phoned about 1:00 o'clock or a little thereafter to know why someone was on his corner. I told him because he wasn't on the corner, that a surprisingly large story, the outbreak of war, had occurred and that his corner was without representation and we sent someone down there to cover it, and I asked him why he wasn't there. 'Well,' he said, 'I go to work at 1:00 o'clock.'
>
> "And I said 'War has broken out.'
>
> "'Well,' he said, 'war or no war, 1:00 o'clock is the time that I go to work.'" [R. 566.]

At the most, the testimony relied upon by the Board could only establish that the named vendors so testifying "were required" to be at their posts and there is no support for a finding of a "general" practice in this respect in view of the unanimous testimony of the supervisory employees of Respondent, that no instructions were given in this respect. [R. 566, 567, 601, 638, 639, 645, 646, 647, 648, 978.]

As stated by Branch Manager Brewster, "There is no set rule for them. They are on their own. It is up to them to be there if they want to make any compensation for themselves." [R. 645.]

An independent retailer or sales agent must normally expect to be diligent in making sales and receiving and caring for the merchandise delivered him, and it is only just that he use such diligence in the case of perishable merchandise. As noted hereinbefore, a requirement that a sales agent devote "all his time" to the sale of the company's product was held not to affect the independent status of the sales agent. (*Supra*, pp. 49-51.)

Moreover, cases dealing with the status of newsboys have held that such requirement is no indication of an employee status.[49]

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[49] In *Birmingham Post Co. v. Sturgeon*, 227 Ala. 162; 149 So. 74 (1933), the newsboy was required to be at his corner at a stated time to receive his papers. In *Bernat v. Star-Chronicle Pub. Co.*, .....Mo. App. .....; 84 S. W. (2d) 429 (1935), the newsboy was required to go to the railroad depot at a stated time to receive his papers. In *Balinski v. Press Pub. Co.*, 118 Pa. Sup. 89; 179 Atl. 897. (1935), the newsboy was required to report at his corner as soon after school as possible, and if he were habitually late he was refused further papers.

*"The Newsboys Are Permitted by Each of the Companies to Return All Unsold Copies and Receive Credit for Them."* [R. 91.]

As a generalization, the aforegoing finding is inaccurate in application to this Respondent. Full "returns" were accepted only in the downtown district, where adequate delivery schedules permitted the re-distribution of unsold copies. In the outlying districts, returns on base order were not accepted and it was up to the vendor to regulate his order to protect himself from loss. Returns of "extras" were accepted in all districts. (*Supra*, pp. 17, 18.)

As pointed out hereinbefore, it is a common practice of manufacturers to accept unsold merchandise for credit.[50]

In the same fashion, the cases dealing with the status of newsvendors hold that the privilege of returning unsold newspapers for credit is no indication of an employee relationship.[51]

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[50] *Sinnet v. Watkins*, 282 S. W. 769; *W. T. Rawleigh Medical Co. v. Holcomb*, 191 S. W. 215.

See also, authorities cited in Note, p. 50 hereof.

[51] See the following cases more particularly referred to in the Appendix: *New York Indemnity Co. v. Industrial Accident Comm.*, 213 Cal. 43; 1 Pac. (2d) 12 (1931); *Birmingham Post Co. v. Sturgeon*, 227 Ala. 162; 149 So. 74 (1933); *Creswell v. Charlotte News Pub. Co.*, 204 N. C. 380; 168 S. E. 408 (1933); *Balinski v. Press Pub. Co.*, 118 Pa. Sup. 89; 179 Atl. 897 (1935).

The Board has recognized that the return of unsold newspapers is not a factor indicative of an employer-employee relation. See *Matter of Houston Chronicle Publishing Company and Houston Newsboys Union, Local 456*, 28 N. L. R. B. 1043, 1045.

*"The Companies Furnish Boxes, Racks, Change Aprons, and Placards Advertising Special Features Contained in the Newspapers. To Facilitate the Work of the Newsboy and to Increase Circulation . . . the District Managers Distribute Such Equipment and Advertising Material to the Newsboy With Instructions to Keep the Newspapers in the Boxes or Racks and to Display the Advertising Matter on Posts, Fire Plugs or Other Vantage Points."* [R. 97, 98.]

There is no evidence whatever connecting this Respondent with the distribution of racks, and this part of the finding is, as to Respondent, not supported by substantial or any evidence.

This Respondent furnished at times small wooden boxes, painted green, with the name and price of Respondent's publication stenciled on the side. None were furnished in the downtown district. [R. 1640.] Papers were not placed in, but on top of the boxes, to keep them out of the dirt of the street. [R. 838.] Change aprons were short denim aprons containing three pockets for loose change. On occasions they were furnished to vendors who asked for them, though not always. [R. 813.] Some vendors asked for them and used them, others used their own change devices. [R. 813, 905.] In no instance was any charge made for boxes or aprons, and, of course, no vendor was compelled to use them. The vendors who used them stated that they were a convenience. [R. 813, 905.]

As to placards, the Circulation Manager of Respondent, in response to a question as to what instructions were given about the display of cards, testified:

". . . the practice of using these cards has continued since 1920, which has become a fixed habit

with the newsboys and members of the circulation department to take them out, distribute them and display them, and no instructions are necessary, or have been for years." [R. 1036.]

This seems obvious, in that any person of ordinary intelligence would not require instructions concerning the use of display cards. The vendors who used the same admitted that they increased the sale of the paper and, thus augmented their profits. [R. 768, 813, 839.] The boxes, aprons and placards bore the name of Respondent's publication and were actually advertising matter. The fact that such advertising material was furnished by Respondent to its retail outlets was more indicative of an independent sales relationship than that of employment. It is common knowledge, amply confirmed by the appearance of any dry goods store, drug store, automobile agency or other sales establishment, that manufacturers of merchandise prepare and furnish all types of advertising material and devices, attractive in design, to attract the attention of prospective purchasers, and, in many instances, utilitarian, so as to insure their use by the merchant.

The furnishing of advertising material is a common feature of the typical "sales agency." In one case, even the requirement that the sales agent pay half the cost of the advertising, was held not to affect the independence of the sales agent.[52]

The fact that the Chronicle Company gave newsvendors caps and aprons with the sign "Chronicle—3c" on them,[53]

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[52]Rosenbluth v. Hudson Motor Car Co., 265 Fed. 680, 681.

[53]See Appendix.

was apparently deemed of no importance, and was overlooked by the Board in its Decision and Order in the Matter of the Houston Chronicle Publishing Co.[54] In cases dealing with the status of newsboys, the furnishing of advertising paraphernalia is held to be no indication of employment.[55]

> *"For His Services in Redistributing Newspapers, the Checkman Receives a Small Salary From the Publisher. . . . In All Other Respects He Occupies a Position Similar to That of the Ordinary Newsboy."* [R. 90, 91.]

While the aforegoing finding is correct in its application to this Respondent, we have heretofore pointed out that a finding of employment for a specific purpose does not, as a matter of law, support a conclusion that the checkman is an employee of Respondent in the conduct of his own independent business. (*Supra*, pp. 52-54.)

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[54]28 N. L. R. B. 1043.

[55]In *Balinski v. Press Pub. Co.*, 118 Pa. Sup. 89; 179 Atl. 897 (1935) the newsboys were furnished with money bags bearing the name of the newspaper as well as "shoulder straps" with which to display the papers. This circumstance was held to be no indication of an employee relationship. In *Gall v. Detroit Journal Co.*, 191 Mich. 405; 158 N. W. 36 (1916) a newspaper carrier used his own automobile, but the newspaper's name was painted thereon. Despite this fact and the fact that the newspaper could terminate relations with him at any time, he was held to be an independent contractor.

In *Matter of Federal Ice & Cold Storage Co. and Produce Drivers and Employees Union, Local No. 630*, 18 N. L. R. B. 161, the company painted its name on ice trucks operated by certain drivers. In finding that these drivers were *not* employees, the Board said: "We are of the opinion that these services amount to no more than aid furnished by a distributor to independent dealers . . ."

*"It Is Undenied That the District Managers Unilaterally Determine the Number of 'Extra' Papers, in Excess of the Established Order, Which the Newsboys Must Attempt to Sell. . . . . In Practice the Newsboys Cannot Determine the Size of Their Established Order Without the Cooperation of the District Manager."* [R. 92.]

As we have heretofore pointed out ("Statement of Case Newsvendors Profit", pp. 16-19), the breaks in the news and the need for speedy printing and distribution of papers make impossible the advance taking of orders for "extras" on any edition. Respondent published six editions a day between the hours of 9:00 a. m. and 5:00 p. m. Thus in the space of eight hours, six complete editions are written, made up, printed and distributed throughout a tremendously large territory (*supra*, pp. 12-14), one edition every one hour and twenty minutes. Each vendor had a "base" or standing order, but experience demonstrated that the sale of newspapers varied tremendously, not only from day to day but from edition to edition, even in normal times.

During the entire day news stories "broke" locally and flooded in on the press wires from all over the world. These were incorporated in the various editions throughout the day. The event of an outstanding story, such as the outbreak of the war, might well double the circulation on the edition which first caught the story. It was an utter physical impossibility to contact 2,200 to 2,500 vendors located throughout the city in time to take specific orders for extras. [R. 566, 567, 1045, 1046, 1047.] Consequently, in order to make fully available to the individual vendor the chance to increase his profits, "extras" over and

above the base orders were carried out by or under the supervision of the district man. The individual vendor was contacted, if he was on his corner and if time permitted, and given an opportunity to order "extras." If he was not present or if time did not permit delay, a quantity of "extras" was dropped off with his regular bundle. *These "extras" were returnable for full credit in all districts.* Thus the vendor, without the outlay of any capital, was consigned merchandise for sale, all of which was returnable for full credit. In the downtown district, the vendor had thirteen opportunities per day to take additional papers, there being six regular deliveries and seven "recovers." In the outside districts there were not less than six regular deliveries, but, of course, fewer "recovers." Thus, through an amazingly efficient distribution system, the corner vendor was given every opportunity to take advantage of a fluctuating and uncertain public demand, to the increase of his profits, without a cent of capital invested in "extras." This important and profitable privilege becomes, in the language of the Board, a unilateral determination of the number of extras a "newsboy must attempt to sell." We respectfully submit that the finding is wholly unsupported by the evidence.

The Circulation Manager testified that one of the duties of a district man was ". . . to accept any regulation of order that may be tendered to him by those street vendors, increases or decreases . . ." [R. 548.] And such regulations were accepted and put into effect to the extent physical limitations of time and delivery facilities permitted. A reduction of a base order obviously could not be made by a district manager on the very base order he was then delivering, and it could not be done in the next edi-

tion unless the district man got back to his branch office before the deliveries on the next edition were made up. Moreover, the vendor could phone a change order to the branch or main office if he wished. [R. 573.] Furthermore, it must be remembered that the base order varied from edition to edition as well as from day to day. (*Supra*, pp. 16-19.) Despite the elaborate and remarkably efficient system devised to assist in the regulation of orders, the Board found it could not be done without the cooperation of the district man, and, relying on the testimony of Arthur Steuart, found that the privilege extended only ". . . to a reallocation of his order with respect to the number of papers of a given edition without changing the total number of papers in the established order." The Board reached this conclusion by entirely ignoring the testimony of this witness on cross-examination. Although maintaining he could not change his order, he admitted "The regular Order I can regulate to some extent" [R. 771] and further admitted that although his base order for the "Night Final" was one hundred papers, he could refuse the entire one-hundred. [R. 772.] Thus on a total base order of four hundred papers, he could regulate this daily order as much as 25% within a single day. Steuart's corner was in an "outside" district where returns on "base order" papers were not accepted. The Board also quoted the testimony of Sam Kahn [R. 93] as to his inability to regulate orders. The record shows that he was a "wholesaler", that the papers he was discussing were papers destined for delivery to "off spot" vendors, in which he had no interest whatsoever. The Board's finding, as aforesaid, is thus based on the testimony of two vendors. Moreover, as to "downtown" vendors, inability to lower orders (of which, there is no evidence whatever) would

have been a matter of no moment, as all papers delivered were returnable for full credit.

There is no testimony to support the finding as to the remaining vendors in the so-called "unit", but on the contrary, representatives of Respondent were unanimous in their testimony that vendors were permitted to regulate their base orders, up or down, and such changes were given effect as quickly as the limitation of time and delivery facilities permitted. The finding is, therefore, not supported by substantial evidence.

The finding does not, as a matter of law, support a conclusion of "employment." Many "sales agents" are required to purchase a minimum amount of goods and such requirement does not affect the independent status of such vendor. (*Supra*, pp. 49-51.)

> *"District Managers . . . Issue Detailed Directions as to the Specific Places Within the Newboy's Allotted Terirtory in Which to Engage in Selling Activities, Particularly With Reference to Standing in Street Traffic and Covering Business Establishments . . ."* [R. 96.]

The finding as to this Respondent is based on the testimony of *one* vendor that *one* district man told him to "always play that Safety Zone." [R. 909.] This selling advice, delivered to one newsboy, wholly fails to support a finding of "detailed directions."

*"The Companies Dealt With Union Representatives With Respect to . . . Grievances. . . ."* [R. 108.]

If this finding implies that this Respondent recognized and dealt with the Union as a representative of "employees", the finding is wholly unsupported by the evidence. Although the Union sought to negotiate, it was admitted by the organizer that the representatives of this Respondent ". . . made it very clear that they would not negotiate a contract—or consider negotiating a contract until it was decided whether newsboys were employees. . . ." [R. 672.]

If the words "negotiating . . . grievances" are intended to designate the practice known in the industry as "registering a beef", the evidence fails to support the finding. As is perfectly natural, vendors will object to the suppliers of their merchandise if they believe they have grounds for objection, and the newspaper business is no exception. The Circulation Manager of Respondent testified that his office had always been open to newsvendors wishing to make complaints, and that practice had continued up to the date of the hearing in this matter. Many individual newsboys had gone to his office and registered "beefs" and "complaints." [R. 550.] Thus Harry Relish "beefed" about being stuck with thirty-five papers [R. 730], and thus just prior to the time he hired his lawyer, J. Allen Frankel to protect his interest [R. 486], he complained about the refusal of Respondent to sell him newspapers. [R. 920.] This practice was well established long prior to the passage of the National Labor Relations Act,

and the formation of the alleged Union here involved. The fact that on occasions thereafter the Union organizer sometimes went with newsvendors to register "beefs" to Mr. Harrison or his assistants did not suddenly transmute those simple and every-day business occurrences into "negotiation of grievances", implying recognition of a "Union", nor admission of an employee status in the one making the "beef." Thus the Union organizer, Pat Comorre, was with his brother-in-law, Harry Powers, when he negotiated the purchase of the corner at 1 th and Spring from the daughter of the deceased owner. He saw the consideration of $150.00 pass and was with Powers when he presented the Bill of Sale prepared by Powers' attorney, Cary McWilliams, to the then occupant of the corner, one Nickerson, an employee of Williams, the deceased former owner [R. 1003], and took over the corner. Thereafter Comorre accompanied Powers (his brother-in-law) to the office of the Respondent when the district man expressed doubt as to the credit standing of the new owner and refused to sell papers on credit to him. During all the period after the organization of the Union, there was no doubt in the mind of the Union organizer that vendors were not recognized as employees by Respondent. We respectfully submit that the evidence does not support a finding that this Respondent dealt with Union represntatives with respect to grievances of "employees."

*"The Record Also Contains Evidence With Respect to the Extent of the Company's Supervision Over the Conduct of the Newsboys While They Are Engaged in Selling Newspapers on the Street."* [R. 103.]

In support of this finding, the Board cites two instances of so-called "Spotters" reports.

The record shows that this Respondent employed two checkers to supervise the activities of some sixty-eight district men. Their duties were described by the Circulation Manager as follows: "We have checkers who check the district men and do not check the newsboys but the district men . . ." [R. 575.] "These checkers are not supposed to discuss anything or talk with or give any orders whatever to newsboys . . ." [R. 576.] They check "The circulation, yes, the revision of the territory, *and whether or not the district manager appears to be neglecting a part of his territory or all of it or none of it.*" [R. 576.] "Well, for instance, he will report that the papers are laid on a certain corner, due at a certain time and they arrive later than that time. He may also report the time that the Daily News of a similar edition arrived at the same place. On a later edition, the last edition of the day, he will report the time that our papers reached some parts of the territory and the time that the Times and Examiner reached those places, with their first edition in the evening." [R. 577.]

It clearly appears that the purpose of these checkers was to observe the functioning of respondent's employees, the district men.

The same witness described the duties of district men as follows:

> "The district man's duty is to supervise a certain territory, to collect accounts for sale of papers from the newsvendors on the different corners that are in his territory, to accept any regulation of orders that may be tendered to him by those street vendors, increases or decreases, and to recover any vacancy that may occur as from time to time newsvendors drop out of that business." [R. 548.]

It will be noted that checkers particularly watch for the proper development of the territory by the district man. Accordingly, if a checker observes a prominent corner without "representation" of this Respondent's paper, he will advise the Circulation Manager. This report to the Circulation Manager is funneled down through the branch managers to the district man involved. [R. 578.] The two instances cited by the Board of alleged supervision of newsboys [R. 105] were instances of this practice. The district manager noted a corner uncovered and eventually a report was given to Louis K. France, the district man, that on a certain night neither newsboys or newspapers could be found on a specified corner. This corner was regularly operated by the newsboy Steuart. Naturally, the district man, believing the corner to be regularly occupied, asked Steuart whether or not the corner was vacant at the time mentioned. The witness Sam Kahn testified to the same effect that he was laid off by a district man because a checker had advised the district man that he was off the corner. Thus were the efforts of the Respondent to check the activities of its own employees, the district men, interpreted by the Board to be "supervision over the conduct of the newsboys." Refer-

ence was also made by the Board to the testimony of one district manager that part of his duties were to "go around and see that . . . the newsboys . . . are working." [R. 104.] What the district man actually said was: "Well, my duties consist of supplying the men papers on the corner and collecting from them in the evening and going around and seeing that they are at work, and covering the territory in general." [R. 681.]

As hereinabove pointed out, this district man's duty was to cover his territory. If corners became unoccupied, he attempted to secure vendors to cover them. As he delivered the late editions of the paper, he naturally observed whether part-time and regular vendors had shown up at the corners usually occupied by them. If they didn't take their corners, it is obvious that he had to make some disposition of the papers normally sold on that corner. As the Circulation Manager testified, "The occupation of a newsboy is a very fluctuating one. They come and go. They are here today and many of them are gone tomorrow." [R. 581.] Accordingly, when the district man testified that his duties consisted of "seeing that they are at work and covering the territory in general," he meant that and nothing more.

The above described testimony established only that the company employed checkers to observe the performance by the district men of their duties and to advise and assist the district men in securing and maintaining retail outlets in the district.

This evidence wholly fails to support a finding of "supervision over the conduct of the newsboys while they are engaged in selling newspapers on the street." It shows instead no interest whatever in the "conduct of newsboys",

but an interest only in the maintenance of a proper number of retail outlets in the district.

The finding of supervision by "checkers", based on the two instances cited by the Board, is wholly insufficient to support a finding of supervision of all the vendors in view of the direct testimony of the Circulation Manager as to the duties of the two checkers. No one in authority, acting on behalf of Respondent, is shown to have authorized or ratified any alleged supervision of newsboys by checkers, and any checking of vendors would be wholly unauthorized and directly contrary to the "checkers" instructions.

The evidence does not support the finding as a matter of law.[56]

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[56]In *New York Indemnity Co. v. Industrial Accident Comm.*, 213 Cal. 43; 1 Pac. (2d) 12, 14 (1931), the district manager testified that one of his duties "was to maintain a status of peace and harmony among the newsboys, and to so far supervise their daily conduct in the territory . . . as to promote the sale of the largest possible number of . . . newspapers . . ." In *Creswell v. Charlotte News Pub. Co.*, 204 N. C. 380; 168 S. E. 408, 409 (1933), the company's supervisor told the newsboy what the headlines were "and checked up the boys in order to ascertain if they were on the job or needed additional papers." In *Balinski v. Press Pub. Co.*, 118 Pa. Sup. 89; 179 Atl. 897, 898 (1935), the company's supervisor occasionally told the newsboys "how two hold the papers, and urged them to cry out the sale." The supervisor also made periodical inspection trips, and if he was of the opinion that a given newsboy was not making good, he informed the company's general manager, and if the latter was satisfied, the corner was taken away from the newsboy. A like result ensued if the newsboy sold the competing paper. In none of these cases were any of these circumstances held to be an indication of an employee relationship.

"*As a General Practice the Newsboys Sell More Than One Newspaper and Handle Magazines. In certain Instances, However, the Companies Have Objected to the Newsboys Handling Competing Publications.*" [R. 106.]

The Board found as a general practice the newsboys sold more than one newspaper. As we have shown hereinabove, the testimony disclosed that *every* newsvendor selling this Respondent's publication also sold one or more competing publications. (*Supra*, p. 19.) In support of the rest of the finding, the Board cites the testimony of *one* newsvendor that *one* district manager "warned" that newsvendor not to sell competing publications. And the same district man told the same newsvendor sometime prior to three years before the date of the hearing not to serve people who asked for the News, in the absence of the vendor who then regularly sold the News on the same corner. The newsvendor so "warned" was, however, at the time of the hearing, selling the Herald, News, Examiner, Times, Saturday Evening Post, Collier's, Liberty and Look. [R. 770.]

It is submitted that if the aforegoing finding is intended to infer that this Respondent objected to vendors selling its publication also selling other publications, it is not supported by the evidence.

The finding is insufficient, as a matter of law, to support the conclusion of "employment." The requirement that the "sales agent" sell the manufacturer's product exclusively is a common feature of such arrangements.[37]

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[37] See *W. T. Raleigh v. Trerice*, 195 N. W. 79; *Standard Fashion Co. v. Cummings*, 153 N. W. 814; *Rosenbluth v. Hudson Motor Co.*, 265 Fed. 680, and cases cited, *supra*, pp. 50, 51.

*"By Arrangement . . . Between The Herald and The News, Substantially the Same Set of Newsboys Sell Both Newspapers . . . . The Publishers of These Newspapers Have Agreed as to the Manner in Which the Newsboys Shall Hold and Display the Respective Papers. In Accordance With That Agreement, District Managers of the News and the Herald Have Instructed the Newsboys to Hold the Herald . . . On the Inside and the News on the Outside in Order to Insure Display of the Masthead of Each Newspaper in Such Manner as to Be Visible to the Public Eye. The Agreement Also Provided That the Newsboys Specify Both Newspapers by Name in Their Cry."* [R. 107.]

The Respondent's Circulation Manager testified that when vendors started to sell both the News and the Herald, no arrangements were made for the display by the vendors of the two papers, and that consequently friction arose between the District Managers of the rival organizations, and that a representative came to his office and suggested "that we should agree upon some fair method of display for both papers and it is understood that it would be well to have the News folded on the outside of the Herald . . . so this appeared to be a fair arrangement and we asked the newsboys in general to cooperate with us to that end." [R. 563.] Thereafter, complaints were received from the representatives of the Daily News that the vendors were not giving them outside display, and consequently Mr. Harrison ". . . notified the Branch Managers to instruct his District Managers to talk with the newsboys, telling them that that was not fair, not in accordance with the understanding, and to give the News their outside display." [R. 564.]

David Bell, Superintendent of Street Sales, testified in his inspections of his district, he never made any note of how newsvendors displayed papers, that it was a matter of no interest to him, and that he never attempted to regulate the manner in which vendors display newspapers. [R. 596.] District Man Woods testified he gave no instructions of any kind. [R. 600.] Branch Manager Brewster testified that in his district he tried to see "that the two papers get what we consider an even break." [R. 642.] Branch Manager Gratz gave no testimony in this connection, but one of his District Men, Plotkin, testified that no instructions were given.

In the Decision and Direction of Elections, the Board commented on his testimony as follows:

> "District Manager Plotkin, of the Herald, disclosed in his testimony that the newsboys have 'had' to display the newspaper prominently by holding it up in the air or, in the parlance of the trade, 'pitch that sheet'." [R. 108.]

What Plotkin actually testified, in answer to a question concerning what instructions were given him, was as follows:

> "Well, I don't know how to answer that. It has always been—a newsboy is generally—will do what we call 'get it in the air' and 'pitch that sheet', and he does what he has had to do for years, and he holds that paper out all the time and so by doing that he always held the News on the outside to give them a break; to give them a display, if that is what you mean.
>
> Q. Let us return to the instructions that Mr. Gratz gave you regarding this display. And will you please tell us what his instructions were? A. I can-

not recall whether he gave us any instructions as to how the boys were supposed to handle the papers or not. I can't recall. It just seems like it was the natural thing to do for any newsboy that knew how to handle a paper or hold papers in his hand." [R. 692.]

The aforegoing testimony developed nothing more than the fact that when vendors started to handle two competing newspapers, the District Man representing the respective publications tried to get what they considered proper "representation" for their own publications. In order to avoid friction, the Circulation Managers of the two papers agreed on what they would consider a fair display, if the papers were displayed at all, and the Circulation Manager of Respondent "asked the newsboys in general to cooperate with us to that end." This testimony, far from showing control over an employee, shows just the contrary. It shows the efforts made by two competing publications to secure proper "representation" from independent vendors selling both such competing publications. All of the testimony related to incidents occurring almost three years before the hearing in this matter, and there was no testimony of any discussion of display between the time the joint sale was undertaken by the vendors and the date of the hearing.

The testimony was insufficient as a matter of law to support a conclusion of "employment." As we have hereinabove pointed out, manufacturers may properly impose a condition on their vendors that such vendors handle the manufacturer's product exclusively (*supra*, pp. 50, 51). If the manufacturer waives such condition and agrees that his vendors may handle competing merchandise, he

may, without changing the independent status of the sales agent, insist that his product be given display at least equal to that given the competing product.

To summarize the testimony relied upon by the Board to sustain its conclusion of employment, it appears:

1. Allotment of "Spots."

Some vendors purchase profitable corners; one procured his corner "from a friend of his" who was working the corner [R. 1117]; some vendors, knowing of the existence of open spots, ask the district men to furnish them papers at such spots; some vendors take over the spots and others apply to the district men for open spots. "Open" spots in the downtown area were rarities. The Superintendent of street sales testified, that they were so rare he couldn't remember the last opening. [R. 589, 590.]

2. Temporary or Permanent Removal or Transfer.

(a) *Testimony Applying Generally to All Vendors.*

The only testimony applying generally to all newsvendors was that of District Manager Woods, that he had never removed anybody in his district for failing to appear on his spot [R. 599], and that of Albert W. Brewster, Branch Manager, that he had never removed a newsvendor for failing to appear. [R. 684.]

(b) *Specific Testimony.*

Five vendors testified to instances, involving themselves only, of temporary "layoffs", and one testified that he was permanently "laid off." The evidence showed in each instance a proper refusal for just cause to furnish papers. One vendor testified to being "transferred" to a better cor-

ner, after an altercation with the owner of the drug store on the corner at which the vendor sold papers. (*Supra*, p. 62.)

### 3. Hours.

(a) *Testimony Applying Generally to All Vendors.*

District Manager Woods testified that vendors ". . . came and went when they felt like it, and they quit when they felt like it . . . I never told anybody what time to show up, or what time to quit, as long as I have been around there . . ." (15 years). [R. 601.] Jake M. Gratz, Branch Manager, testified that he had no instructions from the Circulation Department regarding the hours during which newspapers were to be sold in his district. [R. 638, 639.] Albert W. Brewster, Branch Manager, testified: "They (vendors) are on their own. It is up to them to be there if they want to make any compensation for themselves." [R. 645.] Harry Plotkin, District Man, testified that he gave no instructions to newsvendors with reference "to what time they shall start selling papers." [R. 699.] Louis Kenneth France testified that he gave no instructions to wholesalers or full-time vendors concerning the hours of sale. [R. 713.]

(b) *Specific Testimony.*

Some individual vendors testified that they personally were told when to be on their corners. Vendor Bryant testified that he was told what times the editions would be delivered to his corner. Vendor Spampinato testified that Gordon Norton, "Dealer", "said it would be advisable for me to stay later, until about 8:00 o'clock, to catch late sales." He testified that he had been, at the time of the hearing, June, 1940, selling papers on his corner for six

years; that the aforegoing was the only conversation he had with any representative of Respondent concerning hours; that the conversation took place at the time of the raise in price of the paper [November 1, 1937—R. 1012] which was over three years after he started selling on the corner.

Vendor Barrett testified that another newsvendor "told me to show up at 9:30, and I come at 9:30 and quit at 6:20." [R. 849.] Vendor Schwartz did not testify on this subject, nor did Vendor Roth; Spillers, a "wholesaler," testified that the District Man told him "he would like for me to stay there until 8:00 o'clock at night and I would go on at 10:00 in the morning . . ." [R. 881.] Vendor Kahn testified he was told when he first took the corner to come "at the time the Green Flashes arrive . . . at 9:45 or 10:00, or probably a little later . . . and to stay there until 8:00 o'clock . . ." Kahn was also a "wholesaler." Schullman, a wholesaler, did not testify as to "hours." Gallagher, who at the time of the hearing had owned his corner for twenty years, testified to no instructions, but stated he was on his corner "9:30 to 7:00. I generally knock off about 6:00 o'clock and by the time I fool around and check up and put stuff away it is 7:00 o'clock before I get away." [R. 942.] He "checked in", *i. e.* paid for his papers every morning at 10:00 a. m. [R. 943.] Vendor Newman testified that he came and went as he pleased. [R. 946.] Vendor Georgon did not testify as to "hours"; nor did Faber. Relish testified he was told to be on his corner from 9:30 to 6:30. [R. 728.] Gish did not testify as to "hours." Stewart testified "My hours are from ten o'clock in the morning until nine o'clock in the evening, but I have a man come down at seven o'clock and relieve me and work

until nine." [R. 747.] Steuart was also a "wholesaler." [R. 767.] Kadesh, a wholesaler, testified "Why I come there at 9:30 and stay until 8:00 o'clock." [R. 793.] Vendors Alley, Apice, Nickerson and Comorre did not testify as to hours. Of all the vendors testifying, only five—Spillers, Kahn, Steuart, Kadesh and Relish—testified to direct instructions as to hours.

4. "Returns."

Returns on all papers were accepted in the downtown district. Returns of "base order" papers not accepted in outlying districts but returns of all "extras" accepted.

5. "Racks, Boxes, Change Aprons, Placards."

No racks furnished; no boxes furnished in downtown district; boxes given, upon request and if available, in outside districts; change aprons given, upon request and if available. No requirement that boxes or change aprons be used. Placards used for twenty years prior to date of hearing. No instructions needed for their use.

6. "Determination of Orders."

(a) Full Returns Were Given in Downtown District and "Extras" Were Made Available Thirteen Times Per Day.

(b) *Outside Districts.*

General Testimony—The Testimony applying to news vendors generally was that district men were instructed that their duties were to accept changes in orders, increases or decreases. In outside districts, the base order could be raised or lowered at vendor's will, and changes were put through as speedily as the mechanics of the

change permitted. "Extras" were made available on regular deliveries and were all returnable.

Specific Testimony—Two vendors in these districts, Steuart and Kahn, testified they could not regulate their base orders.

7. "Specific Places."

(a) *General Testimony.*

District man Woods stated he gave no instructions whatever. [R. 600.] No other representative of respondent testified concerning any instructions.

(b) *Specific Testimony.*

Vendor Kahn testified that Plotkin told him to "always play that safety zone."

8. "General Supervision."

(a) *General Testimony.*

The Circulation Manager stated the two "checkers" supervised the work of the district men and had no duties whatever with respect to newsvendors.

(b) *Specific Testimony.*

One vendor, Steuart, testified the district man had shown him a report made concerning the district man's district, of "no papers—no boy" on the corner Steuart occupied. Vendor Kahn testified to the same effect.

The above recapitulation demonstrates the tenuous and unsubstantial nature of the evidence relied upon by the

Board. There was no general testimony, affecting all vendors, of any requirements as to hours, "allocation" of spots, "removals" and "lay offs", furnishing of change aprons and boxes, or issuance of detailed selling instructions, nor was there any general testimony to the effect that vendors could not regulate orders, up or down at will. Resolving all conflicts in favor of the Board's finding, it cannot extend beyond the very few vendors testifying to the alleged instances of "control." Certainly, an inference that such alleged instances of control prevailed generally cannot exist in the face of unequivocal testimony to the contrary.

> "The Board should not discard the positive credible testimony of witnesses in favor of an inference drawn from tenuous circumstances that at best could have supported only an anemic suspicion. Such an inference does not meet the test of substantial evidence."[38]

[38] *National Labor Relations Board v. Sheboygan Chair Co.* (C. C. A. 7), 125 Fed. (2d) 436, 439.

## II.

## THERE IS NO SUBSTANTIAL EVIDENCE SUPPORTING THE CONCLUSION OF THE BOARD THAT THE CLAIMED BARGAINING UNIT FOR SO-CALLED EMPLOYEES OF RESPONDENT WAS AN APPROPRIATE UNIT.

### 1. The Act Requires That the Designated Unit Be Appropriate.

The unfair labor practice charged against petitioner herein was the failure to bargain collectively with the representative of the newsboys. The representative under such Act must be, however, designated or selected by a "majority of the employees in a unit appropriate for such purposes." (Sec. 9(a).) Thus in order to support the charge of unfair labor practice, the Board must first determine that there has been a failure to bargain with a "representative" and moreover, the Board must, in order to find that the representative has been lawfully designated or selected, determine whether or not the so-called unit is "appropriate."

*Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146, 152, 85 L. Ed. 1251, 1258.

### 2. The Bargaining Unit Designated by the Board Was Not an Appropriate Unit.

The Board concluded, as a matter of law, that the appropriate unit as to this petitioner was "all full-time newsboys and checkmen who are engaged to sell the Herald within Los Angeles, California, excluding bootjackers, temporary, casual and part-time newsboys" [R. 119.]

By its Fourth amendment to decision and direction of election, the Board amended the second paragraph of Sec-

tion VI of the decision and substituted therefor, as a separate paragraph, the following:

> "Thus defined with respect to the Los Angeles Evening Herald and Express, the term 'full-time' newsboy means a newsboy who regularly sells to the public five or more editions a day five or more days a week; the term 'part-time' newsboy means a newsboy who sells to the public less than five editions a day or who sells to the public all or any of the daily editions published by the Los Angeles Evening Herald and Express less than five days a week." [R. 141, 142.]

The Decision and Order of March 30, 1942, here under review, found the Bargaining Unit to be the same as that set forth in the Decision and Direction of Elections of January 9, 1941. [R. 345.] The Decision and Order of March 30, 1942, did not, however, define the terms "full-time" or "part-time" newsboys, but it must be assumed that the definition thereof is the same as that contained in the Board's Fourth Amendment to Decision and Direction of Election. [R. 141, 142.]

The Board made no findings of fact in its Order and Decision of March 30, 1942 (the "Complaint" case) supporting its conclusion of law that the alleged unit was appropriate. [R. 345.] However, in its decision and Direction of Elections of January 9, 1941 (the "Representation" case), it stated

> "The Union desires to exclude bootjackers, temporary, and part-time newsboys since they consist largely of schoolboys who do not depend upon the vending of newspapers for a livelihood and because of the irregularity of their employment.

"Each of the Companies contends that the unit sought by the Union in its respective case is inappropriate because newsboys, having interests similar to those whom the Union seeks to represent as exclusive bargaining representatives, are excluded. The Union desires to exclude bootjackers, temporary, and part-time newsboys since they consist largely of schoolboys who do not depend upon the vending of newspapers for a livelihood and because of the irregularity of their employment. Similarly the Union does not desire to include in the unit the suburban newsboys, other than the Times newsboys in Glendale, California, because organization has not as yet been extended to the suburban group generally. Since those whom the Union desires to be included in the unit are, in general, mature individuals who daily rely upon their earnings from the street vending of newspapers as their source of support, since the Union is the only labor organization existing among the newsboys, and because union organization has not at present extended to suburban newsboys other than the Times newsboys in Glendale, California, we find the following units, as requested by the Union, to be appropriate for the purposes of collective bargaining: All full-time newsboys and checkmen who are engaged to sell the Herald within Los Angeles, California, excluding bootjackers, temporary, casual and part-time newsboys."

However, the definition of the unit does not and cannot accomplish its supposed purposes. The aforegoing finding was apparently based upon the testimony of Patrick Comorre, the Union organizer, who described full-time newsboys and checkmen as follows:

"Well, as I find them, most of the check men, practically in all cases with the exception of a few

there, full grown men, or young men 21 or 22 years old, and in most cases older men, and that probably have families and lots of them—most of them do have families—and men that depend on that work for their livelihood. And that goes for the full time men also. In fact, full time men are mostly all with lesser exception than the check men. That is with—they are more so that type of person than of the check men. We have a few check men, I would say, that—on afternoon spots are good sized boys, probably in high school, that gets out of school early and comes out and takes care of the main spots; that is, the wholesale job, as they call it, on that intersection or where he may be." [R. 859, 860.]

The testimony indicates that most of the checkmen are over the age of 21 and are not schoolboys, but some of them are under that age and are schoolboys, "and that goes for the full time men also." Accordingly, it seems clear that the unit does not exclude "schoolboys who do not depend upon the vending of newspapers for a livelihood", nor does it necessarily include all "mature individuals who daily rely upon their earnings from the street vending of newspapers. . . ." There is no age requirement for admission to the Union. A vendor whose corner did not support a sale of the first two morning issues and who thus sold only four editions of the paper, would not be a member of the unit, no matter how dependent he was on the earnings from his newsvending for his support, nor what his age. Nor would he be a member of the unit if he sold six editions a day four days a week. The definition does not require that a member of a unit sell every day the paper is published, as it is published six days a week, yet a vendor selling five days a week would come within the definition.

The further finding that "organization has not been extended to suburban newsboys" selling Respondent's publication is apparently not based upon any intrinsic distinction between suburban newsvendors and city newsvendors. It is based wholly on the desire of the Union that the unit area be confined to the area the Union has succeeded in organizing.

Section 8, Subd. (b) of the Act provides that "the Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof." A unit which is none of these but is based solely on an arbitrary group that the Union has succeeded in organizing is not within the statute. The unit, not being "appropriate" within the meaning of the statute, the Union was not lawfully designated or selected and no unfair labor practice can be predicated on a refusal to bargain with such Union.

*Pittsburgh Plate Glass Co. v. N. L. R. B., supra.*

It is respectfully submitted that the decree of the Circuit Court of Appeals [R. 1852, 1853] should be affirmed.

H. S. Mac Kay, Jr.,
Edward L. Compton,
*Attorneys for Respondent Hearst Publications, Incorporated.*

## APPENDIX.

**Excerpts From Report of Hearing in Case Entitled Eustace v. New York Indemnity Company, Los Angeles Evening Herald et al., Los Angeles Claim No. 10698, Before the Department of Industrial Relations, Division of Industrial Accidents and Safety, January 9, 1929, and February 4, 1929. (On Appeal, Entitled New York Indemnity v. I. A. C. and Reported at 213 Cal. 43, 1 Pac. (2d) 12.)**

Testimony of Claude Eustace, the claimant:

"Q. Mr. Eustace, will you state please just what the circumstances were under which you became identified, if you did become identified, with Mr. A. L. Smith sometime in the latter part of October, 1928? A. I went up to his district headquarters at Washington and Main and asked him if he had any open corner to go to work.

Q. Do you recall about when that conversation took place? A. No, sir.

Q. What did Mr. Smith say to you at that time? A. He told me that he did not have a very good corner open but I could take the northwest corner of Washington & Main until school was out, and then he would change me over to the northeast corner from the time school was out until 7 o'clock at night.

Q. Had you ever been identified with Mr. Smith previous to that time? A. Yes, sir.

Q. During what period? A. It was either in 1926 or 1927.

Q. When did you first start selling papers after this last conversation that you had with Mr. Smith on the

corner of Washington and Main? A. You mean start selling after the last time I went up to him and asked him for a job?

Q. Yes. A. I went to work for him that same day.

Q. Did you have any definite arrangements for the number of papers that you were to get? A. Yes, sir.

Q. What were those arrangements? A. The arrangement was, I was to take out 130 Heralds a day, and take out the Records but they were returned, and I had to pay for these 130 Heralds a day.

The Referee:

Q. Did Al Smith tell you you couldn't sell on the other corners? A. Yes, sir.

Q. How did he regulate that? A. Why by contract with another boy on the other corner.

Q. I don't think you mean that. Did he regulate it by refusing to sell you papers? A. If I sold on the other boy's corner, yes.

Q. He would refuse to sell you papers? A. Yes.

Q. Mr. Eustace, before you started to work did anyone designate to you where you should sell papers? A. Al Smith did.

Q. In what territory did he designate you were to sell these papers in? A. From 9:30 in the morning to school was out I was supposed to sell on the northwest corner of Washington and Main, and after school until 7 o'clock at night I was to sell on the northeast corner of Washington and Main.

The Referee:

Q. Here is another thing, the paper—does it prescribe the quota that your corner must sell? A. Yes, sir.

Q. If you don't sell that quota what happens and how do you do it? A. They take the papers away from you.

Q. How do you know that? A. Because I have had orders to do it myself when I was district man.

Q. Have you ever seen it done recently? A. I seen it done in July, 1928.

Q. Do you know the Herald is doing that right along, to boys that don't produce? A. Yes, sir.

Q. How do you know it? A. I seen it done twice, once in June and once in the latter part of July, 1928.

Q. They refused to sell to certain boy and put another boy on that corner? A. Yes, sir.

Q. And sold to him? A. Yes, sir.

The Referee:

Q. Who prescribed each day the number of papers that you were to receive? A. Al Smith, the district man at Washington and Main.

Q. Did you know before the papers were sold to you how many there was going to be in a bundle? A. Yes, sir.

Q. How do you know that? A. Because they are marked when they come down in a bundle, and the bundle is to be the same every day.

Q. If you want to take less how do you do? A. I would just lose the corner.

Q. If you want to take more, what would you do? A. I could tell Al Smith and leave increase for me."

Testimony of Fred E. Neal, Assistant Circulation Manager, Evening Herald:

"A. I handle the streets and everything else. I investigate all day long.

Q. Do you go on the various corners and check up on your district managers? A. Every day of my life except one or two days I am stuck in the office and cannot get out.

Q. At that time do you see who is selling papers on the corner? A. Absolutely.

Q. Do you make a check on the boys that are there? A. No, I don't call and personally check there on it.

Q. You mean if a boy— A. If I don't see him I tell the district man 'you better cover that corner.'

Q. Then what does he do? A. He covers it, tries to get a school boy.

Q. Do you supervise the boys personally? A. No.

Q. That's done by the district manager, isn't it? A. Yes.

Q. They have these different territories on the corner? A. The district man has a definite territory."

**Excerpts From the Record and the Opinion in the Matter of Houston Chronicle Publishing Company and Houston Newsboys Union, Local 456, Case No. R-2024, Heard Before the Trial Examiner on August 26, 27, 28 and 29, 1940, at Houston, Texas. (28 N. L. R. B. 1043.)**

(References, thus [R. .....], are to the record in the above case.)

Newsboys report to work at 9:00 a. m. [R. 373.]

"Checks in" or settles up at 7:00 p. m. [R. 374.]

Newsboys are engaged in selling papers on the downtown streets of Houston from 9:00 a. m. to 7:00 p. m. [R. 373.]

The witness McDessy, the president of the Union, testified: "The district man tells you what time to get down and gives you your papers, and if you are not there somebody is going to be there to take your place." [R. 68-69.]

The witness Sexon testified that he was told when to report for work, when extras were coming out [R. 245] and how long to stay on the corner, and was reprimanded when he failed to report for papers; that Golden (City Street Circulator) told practically all the newsboys one day that he would "fire" them all if they did not stay on their corners and get another bunch to put in their places. [R. 271.]

The Chronicle Company gave newsboys caps and aprons with the sign "Chronicle 36" on them [R. 326]; they did not charge for them—merely gave them. [R. 328.]

The witness Sexon, an officer of the petitioning union, testified that a newsboy named Hibbler had been "fired." [R. 525.]

The witness Bobbie Romel claimed to have been "fired" [R. 387]; that Mr. Golden removed him because he was playing the horses a little. [R. 388.]

The witness Sexon testified that the price of the Chronicle was changed to 3¢, and that he was "fired" because he did not holler "Chronicle is now 3¢." [R. 311.]

The witness Charles Sanders testified that he was "fired" by Golden. [R. 690.]

The witness Benny Gomez testified that "he (Golden) 'fired' me twice." [R. 102.]

The witness McDessy testified he had seen Golden "fire" a man and get a policeman to take the papers away from the man; that possibly the man was drunk. [R. 83.]

The witness Sexon testified that Golden (City Street Circulator) designated certain corners and places at which newsboys should sell, and that Golden removed him from the Humble Building corner to the Gulf Building, but on cross-examination admitted that the Gulf Building was in the heart of Houston and a better corner than the Humble corner. [R. 329-330.]

McDessy testified that he had seen Chronicle men checking other men selling Houston Chronicles. [R. 82.]

The witness Sexon testified as to the price news vendors were required to sell the papers for. He testified that it was an unwritten law that newsboys did not sell the papers under the regular price. [R. 87-88.]

The witness Sexon further testified that Golden took pictures of newsboys on corners as evidence of whether

they were selling papers [R. 232], and further testified that Golden reprimanded him for leaving corners. [R. 300-301.]

## Unit.

Board's Exhibit 18 shows the petitioning union claimed the proper unit to be "all employees engaged in selling newspapers on regularly established street corners and office buildings in the downtown area of Houston.

28 *N. L. R. B.* 1043, 1045:

> "The Company keeps a board in its offices that contains 43 hooks, one for each downtown selling station. There are four checks on each hook, representing the four daily editions of the Houston Chronicle. The newsboys come to the Company's offices every morning and remove the checks from the hooks corresponding to their downtown location. The newsboys themselves are alone responsible for the location they select to sell newspapers. . . ."
>
> "Several newsboys testified that they have repeatedly complained to the Company about other newsboys selling papers on their corners, but that the Company has consistently refused to refrain from selling papers to newsboys other than those who have regular stations in the downtown area.[1] Although several newsboys testified that they had been 'fired' by Golden, it appears that in fact all that had happened is that their papers were given to other newsboys when they had gotten into trouble and had been unable to sell them."

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[1] "These stations are 'regular' only in the sense that they have been acquired by the newsboys themselves, who appear there regularly to sell the papers."

**Decisions of State Courts Holding That Newsboys Are Not Employees, With Summary of Facts in Each Case Showing Its Application to the Facts Here Presented for Review.**

In *New York Indemnity Co. v. Industrial Accident Comm.*, 213 Cal. 43, 1 Pac. (2d) 12 (1931), newspapers were delivered to a newsboy daily by a district manager acting for two Los Angeles newspaper publishers. In the case of one newspaper ("Herald"), the newsboy paid 2¢ per copy, either at the time the papers were delivered to him or at the close of sales for the day. Unsold copies of such paper were not returnable. In the case of the other newspaper ("Record") sold by the boy, credit was given him for returned copies. In the case of both newspapers the newsboy's profits consisted in the difference between the price he paid and the price at which the publishers permitted him to resell. The newsboy was allotted a specified corner or street location by the district manager (an employee of the publishers), who instructed him "not to intrude upon or interfere with the corner or place allotted to another. Each . . . newsboy was expected and in fact required to be active and vigilant in making sales of a prescribed minimum number of each of said newspapers . . . in short, to be a 'hustler' in making sales. Otherwise his allotted space or corner would be given to another newsboy and he would be refused further copies by the district manager. The latter testified that one of his duties as such district manager . . . was to maintain a status of peace and harmony among the newsboys, and to so far supervise their daily conduct in the territory . . . as to promote the sale of the largest possible number of copies of each of said newspapers . . ." The California Workmen's Compensation Act at

the time of this decision[2] defined "employee" as "every person in the service of an employer as defined in section seven hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written." (Sec. 7 referred to defined "employer" as ". . . every person . . . and corporation . . . who has any person in service under any appointment or contract of hire, or apprenticeship, express or implied, oral or written . . .")

It was held that the newsboy was *not an employee* entitled to the benefits of this statute. The court stated (213 Cal. at 48, 49) that the "essential inquiry" was "whether the nature and degree of control exercised by the publishers . . . through their district manager, was such as would suffice to justify the finding of the Commission to the effect that newsboys . . . stood in relation of employees of the publishers . . . ," and concluded the "control which the publishers . . . undertook to exercise . . . would not as a matter of law be sufficient to constitute such newsboys . . . employees . . . We are satisfied that the finding of the Commission . . . amounted to an erroneous legal conclusion . . . ."

This case was relied upon and approved in *State Compensation Ins. Fund v. Industrial Accident Comm.*, 216 Cal. 351, 14 Pac. (2d) 306 (1932), dealing with the status of a newspaper "routeman" and route carrier, and was followed in *Associated Indemnity Corp. v. Industrial Accident Comm.*, 115 Cal. App. 754, 2 Pac. (2d) 51

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[2]This case was decided June 27, 1931. Effective August 14, 1931, an amendment to this statute became effective excluding from its operation "any person engaged in vending . . . any newspaper . . . where the title to such newspaper . . . has passed to the person so engaged . . ."

(1931), and *Hartford Acc. & Ind. Co. v. Industrial Accident Comm.*, 123 Cal. App. 151, 10 Pac. (2d) 1035 (1932), dealing with the status of newsboys.

In *Birmingham Post Co. v. Sturgeon*, 227 Ala. 162, 149 So. 74 (1933), the newsboy was assigned a certain "corner" by the company. He was required to call at the company's office at a certain hour each day to obtain a supply of papers. Subsequent editions were delivered to him at his corner at stated hours and he was required to be there to receive the same. He was not permitted to sell any papers except those published by defendant "except after checking in at defendant's office on Saturday nights." After reaching his corner he was permitted to sell papers *only* along a prescribed route, or to sell at not less than the newspaper's published retail price. He could turn in unsold copies, but was required to account daily for all copies received less those turned in. If he failed to call for his first assignment of papers, another newsboy was assigned to his corner. The company had the right to dispense with his services "at any time they became unsatisfactory for any reason." The Alabama Workmen's Compensation Law defined "employer" as "every person . . . . who employs another to perform a service for hire and to whom the 'employer' directly pays wages," and provided also that, "The terms 'employee' and 'workman' are used interchangeably . . . ." It was pointed out (149 So. at 77), that under this statute the test of employment was whether defendant had the power to control the means and agencies by which the work was

done It was held that the newsboy was *not an employee* under this statute. Although the court says (149 So. at 80):

> "We have recognized that our statute is to be liberally construed to the end that its wise and humane purpose may be advanced . . ."

it concludes (149 So. at 79):

> "Under the facts as here presented, we think it clearly appears there was neither sufficient control exercised, or right to do so, reserved, as to support the relation of employer and employee."

In *Creswell v. Charlotte News Pub. Co.*, 204 N. C. 380, 168 S. E. 408 (1933), the newsboy was engaged by the company's supervisor, who turned over to him daily a certain number of newspapers on credit. Subsequent settlement was at the rate of 3c per copy, the newsboy retaining as his own the selling price above that rate. All unsold papers were returned at the end of the day. The newsboy was assigned a regular territory. The company's supervisor told the newsboy what the headlines were "and checked up the boys in order to ascertain if they were on the job or needed additional papers. If they did not stay on the beat assigned or were not active in the effort to sell papers, they lost their jobs." The newsboy solicited whom he chose "and otherwise conducted the selling according to his own notions and methods." The Workmen's Compensation Act of North Carolina defined "employee" to mean "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written." It was held

that the newsboy was *not an "employee"* entitled to the benefits of this Act. The court said (168 S. E. at 409):

> "While there was certain supervision exercised by the agent of defendant with respect to the territory assigned, *the control over the methods of selling was too uncertain, indefinite, and remote to constitute the relationship of employer and employee.*"

In *Bernat v. Star-Chronicle Pub. Co.*, 84 S. W. (2d) 429 (1935), the newsboy agreed to pay for the papers of two newspaper publishing companies monthly at a wholesale rate and to sell only at the companies' established retail rate. His list of newspaper subscribers belonged to the company. The company reserved the right to sell to as many newsdealers in the locality as it desired. If the newsboy failed to conduct his activities "to the entire satisfaction of the companies" then the latter could discontinue supplying him with papers. The newsboy was required to confine his activities to the town in which he lived, and was permitted to return unsold papers for credit. He was supposed to go to the railroad depot each day for the purpose of receiving his bundles of papers. The Missouri Workmen's Compensation Law defined "employee" as "every person in the service of any employer . . . under any contract of hire, express or implied, oral or written, or under any appointment or election." It was held that the newsboy was *not an employe* entitled to the benefits of this statute, the court saying (84 S. W. (2d) at 433):

> "Undoubtedly the form of definition employed indicates a legislative intent that . . . the term 'employee' shall be given a broad meaning . . .
>
> . . . . . .

*"Undoubtedly a certain limited right of supervision was exercised or at least reserved* to the companies so as to enable them to see to it that the final result contemplated by the arrangement was accomplished, but not such right of supervision over the methods, details, and particulars of the work as to give rise to the relationship of employer and employee . . .

. . . . . .

". . . Furthermore, it is significant that . . . the two publications being sold by claimant at the time of his injury were strictly competitive and not complementary, which is an added reason for finding that his actual status was inconsistent with that of an employee of the two publishing companies."

In *Balinski v. Press Pub. Co.,* 118 Pa. Sup. 89, 179 Atl. 897 (1935), the company's district manager was instructed "to place" a newsboy on street corners in his district, the boy to have "more or less exclusive rights" to sell the paper in the vicinity of his corner. The company furnished the newsboys with money bags bearing the name of the newspaper as well as "shoulder straps" with which to display the papers. The district manager furnished the newsboys copies of the papers to be sold and each evening accepted back the unsold papers. He also occasionally offered a price to the newsboy who would sell the most newspapers. The newsboys were required to report at their assigned corners as soon after school as possible. If a newsboy was habitually late at his corner for his first delivery of papers, "the corner would be taken away and further papers refused." Each newsboy was asked not to sell on corners assigned to other newsboys, or in front of drug stores selling the newspaper. If he continued to do so his corner was taken away and

further papers refused. The same result followed if the newsboy sold papers in excess of the price fixed, or sold the competing newspaper or "failed to sell a sufficient number of newspapers." Occasionally the company's supervisor told the newsboy "how to hold the papers, and urged them to cry out the sale . . ." The supervisor also made periodical rounds of inspection and if he was of the opinion that the newsboy was not making good, he informed the district manager, and if the latter was satisfied, the corner was taken away and further papers refused. Each newsboy was supposed to wait each evening until the district manager had come around and settled with him. It was held that the newsboy was *not an employee* under the Pennsylvania Workmen's Compensation Act. The court said (179 Atl. at 899):

> "The evidence establishes that Shanahan (the district manager) neither independently, nor as an agent of the appellant (newspaper), exercised such authority or control over the decedent (newsboy), or the newsboys generally, as to establish the relationship of master and servant, thus constituting the decedent an employee of the appellant."